



POLICE DEPARTMENT

April 22, 2010

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In the Matter of the Disciplinary Proceedings : **AMENDMENT**  
- against - : **TO**  
Police Officer Alvin Malcolm : **DECISION**  
Tax Registry No. 917117 : Disciplinary Case Nos.  
101 Precinct : 81306/05 & 81660/06  
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X

The following is an amendment to correct (*nunc pro tunc*) Disciplinary Case Nos. 81306/05 & 81660/06 in regard to the penalty recommended by Assistant Deputy Commissioner – Trials Claudia Daniels-DePeyster on November 9, 2009 and approved by Police Commissioner Raymond W. Kelly on February 18, 2010.

A handwritten signature in black ink, appearing to read "Martin G. Karopkin".  
Martin G. Karopkin  
Deputy Commissioner – Trials

**APPROVED**

APR 27 2010

A large, stylized handwritten signature in black ink, appearing to read "Raymond W. Kelly".  
RAYMOND W. KELLY  
POLICE COMMISSIONER

**FIRST ENDORSEMENT**

**COMMANDING OFFICER, POLICE COMMISSIONER'S OFFICE** to Deputy Commissioner, Trials, April 27, 2010. Please note the Police Commissioner's **APPROVAL** of the attached amendment to correct Disciplinary Case Nos. 81306/05 and 81660/06 involving P.O. Alvin Malcolm, Tax No. 917117, regarding the disciplinary penalty recommended by Assistant Deputy Commissioner of Trials, Claudia Daniels-DePeyster, on November 9, 2009.

Additionally, please ensure that all affected Department records are accordingly amended, if necessary, including the Respondent's time/leave balance and personnel records. For your necessary attention.



Michael E. Shea  
Assistant Chief

## PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974). The Respondent was appointed to the Police Department on July 18, 1996. Information from his personnel record that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

The Respondent has been found Guilty of giving incorrect testimony to a Kings County Grand Jury regarding the circumstances of a narcotics operation on three dates. The Respondent gave credible explanations which included the fact that he did not want to reveal the name of the CI. While it is true that he named the CI in his DD5s and affidavit for a search warrant, that is different from testifying to a room full of grand jurors. The Respondent also testified in his own defense that this was his first narcotics case and he had received no training, and that he received only perfunctory trial preparation prior to testifying before the grand jury. Further, there was no personal gain to the Respondent based on his testimony. However, the Respondent still took an oath prior to testifying and had an obligation to testify correctly. In trying to formulate a penalty for this misconduct, this matter is analogous to a number of DCT cases involving incorrect complaints submitted to district attorney's offices in prostitution/ drug cases where the penalty has been 30 penalty days.

The Respondent asked this Court to consider Disciplinary Case No. 79397/03 on the issue of this Respondent's grand jury testimony. In that matter, the Respondent was found Not Guilty of conduct prejudicial in that he wrongfully entered a premise without possessing a lawful search warrant authorizing the search of the premises. The Court

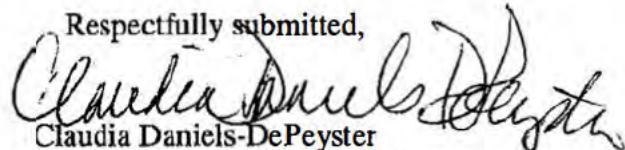
found that the Respondent was part of a back up team and did not question the validity of the search warrant as he rendered assistance. The Court also found that the Respondent acted in good faith within the scope of his lawful authority. Cited was the premise that, "we do not require police officers to possess the expertise of a constitutional law professor when they take action." (See Disciplinary Case Nos. 75890/00 and 75891/00). I did not find that case to be on point particularly since this case did not involve police action on the street, but rather testifying under oath about police action taken. Also, the Respondent in this matter was not acting as back up or being led or directed by a seasoned police officer as he testified.

The Respondent has also been found Guilty of seven administrative violations which include: failing to carry his shield, carrying an unauthorized firearm, failing to record a firearm on his Force Record card, failing to fully load his Kahr- K-9 firearm, failing to submit a Change of Name, Residence and Social Condition form when his telephone number changed, and failing to notify his commanding officer of the changed telephone number. O'Hare of the Brooklyn North Investigations Unit testified that the onus is on the Respondent to insure that his Force Record and other personnel records maintained by the Department are updated. With respect to the administrative violations, this Court recommends that the Respondent forfeit an additional 30 penalty days.

Given the number of administrative violations that the Respondent has been found Guilty of, coupled with his performance record with the Department, a period of monitoring is warranted to ensure that this type of conduct will not be repeated. This tribunal has held that a period of dismissal probation "gives the Respondent the benefit of another chance to show that he can be an asset to this Department while affording the

agency the prerogative of ending his employment if he does not." (See Disciplinary Case No. 75596/00 and 75441/00).

Accordingly, this Court recommends that the Respondent be DISMISSED from the New York City Police Department, but that the penalty of dismissal be held in abeyance for a period of one year pursuant to section 14-115 (d) of the Administrative Code, during which time he remains on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings. It is further recommended that the Respondent forfeit the 29 days he served on pre-trial suspension and that he also forfeit 31 vacation days, for a total forfeiture of 60 days.

Respectfully submitted,  
  
Claudia Daniels-DePeyster  
Assistant Deputy Commissioner-Trials



POLICE DEPARTMENT

November 9, 2009

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Alvin Malcolm  
Tax Registry No. 917117  
Manhattan Court Section  
Disciplinary Case No. 81306/05 & 81660/06

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The above-named member of the Department appeared before me on April 13, April 14 and April 23, 2009, charged with the following:

Disciplinary Case No. 81306/05

1. Said Police Officer Alvin Malcolm, assigned to the 81<sup>st</sup> Precinct, while on-duty, or about November 8, 2004 in King's County, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, in that said Police Officer did give incorrect testimony to a Kings County Grand Jury regarding the circumstances of a narcotics operation; to wit, said Officer did testify that he did purchase cocaine from a person known to this Department on July 22, 2004, August 5, 2004 (stated in error as August 5, 2002) and October 22, 2004, when in fact said Officer had not personally made cocaine purchases on those dates (*As amended*).

P. G. 203-10 Page 1, Paragraph 5 GENERAL REGULATIONS

Disciplinary Case No. 81660/06

1. Said Police Officer Alvin Malcolm, assigned to the 81<sup>st</sup> Precinct, while off-duty, on or about January 30, 2006, did improperly attempt to return property to a vendor from which it was not purchased, in that, Respondent attempted to return baby formula to a Rite-Aid where it was not purchased without presenting a receipt.

P.G. 203 10 Page 1, Paragraph 5 – GENERAL REGULATIONS

2. Said Police Officer Alvin Malcolm, assigned as indicated in Specification # 1, while off-duty, on or about January 30, 2006, failed to carry his shield at all times, when not in uniform, as required.

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P.G. 204 – 15 Page 1, Paragraph 3, Interim Order    UNIFORMS AND  
EQUIPMENT

3. Said Police Officer Alvin Malcolm, assigned as indicated in Specification # 1, while off-duty, on or about January 30, 2006, did wrongfully carry an unauthorized firearm, to wit, Kahr K-9, 9m.m., semi-automatic, serial # [REDACTED], without authority or permission to do so.

P.G. 204 8 Page 1, Paragraph 3 FIREARMS

4. Said Police Officer Alvin Malcolm, assigned as indicated in Specification # 1, while off-duty, on or about January 30, 2006, failed to record his firearm, to wit, Kahr K-9, 9m.m. Semi-Automatic, serial # [REDACTED], on his Force Record Card (PD406-143), as required.

P.G. 204 08 Page 1, Paragraph 3 - FIREARMS

5. Said Police Officer Alvin Malcolm, assigned as indicated in Specification # 1, while off-duty, on or about January 30, 2006, failed to fully load his firearm, to wit, Kahr K-9, 9m.m. Semi-Automatic, serial # [REDACTED], in compliance with the specifications and standards of the Police Academy, Firearms and Tactics Section, as required.

P.G. 204 08 Page 1, Paragraph 3a - FIREARMS

6. Said Police Officer Alvin Malcolm, assigned as indicated in Specification # 1, while off-duty, on or about February 23, 2006, having changed said officer's telephone number did fail and neglect to notify his commanding officer by submitting form Change of Name, Residence or Social Condition (PD 451-021), as required.

P.G. 203 18 Page 1, Paragraph 3 - RESIDENCE REQUIREMENTS

7. Said Police Officer Alvin Malcolm, assigned as indicated in Specification # 1, while off-duty, on or about February 23, 2006, having changed said officer's telephone number did fail and neglect to notify his commanding officer for emergency notifications, as required.

P.G. 203 18, Page 1, Paragraph 2 – RESIDENCE REQUIREMENTS

8. Said Police Officer Alvin Malcolm, on or about November 30, 2006 and/or October 28, 2008, did wrongfully make false statements to a member of the Department who was conducting an official investigation, in that said Police Officer, when being questioned by Sergeant Robert O'Hare of the Brooklyn North Investigations Unit, regarding the method by which formula found on said Police Officer's his person on January 30, 2006 had been obtained, did state on November 30, 2006, that it had been obtained through the WIC program, and did further state on October 28, 2008, that he had no knowledge of where said formula had been obtained (*As amended*).

P.G. 203 08 Page 1, Paragraph 1 – MAKING FALSE STATEMENTS

9. Said Police Officer Alvin Malcolm, on or about November 30, 2006 and/or October 28, 2008, did wrongfully interfere with an official Department investigation, in that said Police Officer, when being questioned by Sergeant Robert O'Hare of the Brooklyn North Investigations Unit, a member of the Department who was conducting an official investigation regarding said Police Officer's use of formula obtained through the WIC program, did state on November 30, 2006, that he had been utilizing and exchanging formula obtained through the WIC program, and did provide conflicting information on October 28, 2008, wherein he stated that he had no knowledge of where said formula had been obtained (*As amended*).

P.G. 203 10 Page 1, Paragraph 5 GENERAL REGULATIONS

10. Said Police Officer Alvin Malcolm, on or about and between November 10, 2005 and March 19, 2006, did, while acting in concert with another, known to this Department, knowingly and with intent to defraud, make a false statement or provide false information for the purpose of establishing or maintaining eligibility for public assistance benefits, and did thereby take or obtain public assistance benefits from the WIC program (*As amended*).

PL 158.05 WELFARE FRAUD IN THE FIFTH DEGREE

PL 20.00 CRIMINAL LIABILITY FOR CONDUCT OF ANOTHER

11. Said Police Officer Alvin Malcolm, on or about and between November 10, 2005 and March 19, 2006, did, while acting in concert with another, known to this Department, did steal property from the WIC program (*As amended*).

PL 155.25 PETIT LARCENY

PL 20.00 CRIMINAL LIABILITY FOR CONDUCT OF ANOTHER

12. Said Police Officer Alvin Malcolm, on or about January 30, 2006, did knowingly possess stolen property, with the intent to benefit himself or a person other than an owner thereof, to wit: formula obtained from the WIC program (*As amended*).

PL 165.45 CRIMINAL POSSESSION OF STOLEN PROPERTY IN THE FOURTH DEGREE

13. Said Police Officer Alvin Malcolm, on or about and between November 10, 2005 and March 19, 2006, did, while acting in concert with another, known to this Department, knowingly misrepresent circumstances in order to obtain WIC benefits (*As amended*).

NYCRR 10 NYCRR 60-1.7 (a)(1) VIOLATIONS OF WIC PROGRAM

The Department was represented by Lisa M. McFadden, Esq., Department Advocate's Office and Respondent was represented by Michael Martinez, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

### DECISION

The Respondent is found Guilty in Disciplinary Case No. 81306/05. In Disciplinary Case No. 81660/06, the Respondent is found Guilty in Specification Nos. 2-7 and Not Guilty in Specification Nos. 1, and 8-13.

### SUMMARY OF EVIDENCE PRESENTED

#### The Department's Case

The Department called Carlyle Byron, Earle Wilkinson, Patricia Clifton, Sergeants Kevin McMillan and Robert O'Hare and Lieutenant Timothy Anderson as witnesses.

#### Carlyle Byron

Byron testified that he is a store manager with the Rite Aid Corporation. He has been employed with the company for over 21 years and has been in his current position for the past 11 months. Prior to becoming a store manager, he was a lost prevention agent with Rite Aid for 13 years. In January of 2006, he was a lost prevention agent. His duties at that time included visiting other Rite Aid stores with a co-worker to set up and

monitor security cameras. On January 30, 2006, he was assigned to the [REDACTED] [REDACTED] Store No. [REDACTED]. He had been assigned to that store for approximately four weeks. He set up video cameras in the ceiling, as well as, in the back and observed and monitored persons as they entered the store. He set up approximately six video cameras that were visible in the store. Byron explained that all six video cameras were recording at the same time. Each monitor could be reviewed or an individual camera could be set to be viewed by another monitor. He further explained that a camera could be moved to follow the movement of one person through the store and he had control of the cameras. He said that he would be monitoring the cameras from the back of the store and he could only see the full location of the store by viewing the video cameras.

Byron testified that on January 30, 2006, he was working with Earle Wilkinson (assistant manager) when there was an incident involving a police officer named Alvin Malcolm, (later identified as the Respondent). Byron stated that he observed the Respondent when he entered the store. He was carrying a book bag over his shoulder, he had a hat on his head and he walked to the baby formula section of the store. Byron explained that the baby formula section is a "hot aisle" because merchandise is always missing from that aisle. Byron stated that he observed the Respondent use his right hand to remove two Enfamil cans from the shelf. He walked out of the aisle and was going toward the register. He then observed him remove the bag from his left shoulder and when he turned around, he observed the Respondent with only one can of Enfamil in his hand. Byron explained that when the Respondent removed the bag from his shoulder, he only had a back view of him from the camera. Byron stated that he could not recall the specific type of Enfamil that the Respondent removed from the shelf. He then observed

the Respondent walk away from the aisle, make a left turn and then proceed toward the register through another aisle in the store.

Byron stated that once he observed the Respondent heading toward the register, he left the back of the store, walked up and stood behind the Respondent. The Respondent waited on line until it was his turn. He then removed the bag from his left shoulder, took out one can of Enfamil from the bag and placed it on the counter. He also placed the one can he had in his hand on the counter and made a statement to the cashier.

The Respondent informed the cashier that he would like to make an exchange. Byron stated that at that point he stepped up from behind the Respondent took the two cans of Enfamil and asked the Respondent to leave the store. Byron denied telling the Respondent that he was under arrest or that he forcibly held him in any way. He explained that he knew there were two cans of Enfamil that belonged to the store and once the Respondent put them up on the counter he took them back and asked him to leave the store. He did not intend to have the Respondent arrested. He further explained that the store policy is, if someone is going to be arrested, they wait until the person checks out and heads to the door to stop them. Byron said that he knew the two cans of Enfamil were from his store because they had the store number on the ticket and the store No. is [REDACTED].

Byron stated that the Respondent replied that the cans were his. Byron began to move toward the back of the store and so did his partner, Wilkinson. The Respondent also followed him to the back of the store. He said he walked, followed by the Respondent who was followed by Wilkinson. When they arrived at the back of the store in the lunch room, Byron asked the Respondent to remove the bag from his shoulder so

that he could see what was inside. The Respondent removed the bag and he noticed that there were three more cans of Enfamil in the bag. He stated that he knew the three cans were not from his store because they had a different price tag on them. Byron said he knew they were from store No. [REDACTED] located on [REDACTED] and [REDACTED]. He asked the Respondent if he had a receipt for those cans and the Respondent told him that he did not have a receipt because one was not given to him. Byron said he left the back room and went to call the police in the front of the store. He informed the police that he had a shoplifter at the store who was not cooperating and that he needed some assistance. When he returned to the lunch room, he was informed by Wilkinson that the Respondent was a police officer and that he had a gun. Byron said he left the lunch room again and then walked to the area where the recording system was. He explained that he wanted to rewind the tape so that he could show the officers when they arrived what he observed on the videotape. Byron recounted what transpired from the time he saw the Respondent enter the store, until he confronted him at the register using the videotape as a guide Department Exhibit (DX) 1. Byron explained that he [Byron] could be seen in the video wearing a cap.

Byron stated that after sometime, police officers responded to the store. He showed them the videotape of the incident. He also believed that the two cans of formula were taken by the police officers to the station house.

During cross-examination, Byron acknowledged that he gave a tape-recorded interview to the police the night of the incident on January 30, 2006. He also acknowledged that he gave testimony in conjunction with a lawsuit in reference to this matter. He admitted that he was being sued by the Respondent in that he had been served

with legal papers. He also stated that he is represented by an attorney who is present at trial today. Byron admitted that when he took the two cans of baby formula from the Respondent, he had no intentions of arresting him. He admitted that it was within his discretion to decide whether or not to arrest someone for petit larceny.

Byron acknowledged that when he confronted the Respondent at the register, he did not have enough to charge the Respondent with petit larceny. Byron stated that the Respondent was free to leave. He denied telling the Respondent to follow him to the back of the store. Byron denied that he gestured for the Respondent to follow him to the back of the store. He also denied that such gestures were observed on the videotape. He also denied that he and Wilkinson took the Respondent into custody in the back room.

Byron acknowledged that the Respondent had two cans of baby formula that came from store No. [REDACTED] as well as three additional cans of baby formula that came from a different Rite Aid store. Byron stated that the two cans the Respondent placed on the counter at the register were the Gentlelease Enfamil brand of baby formula. He acknowledged hearing the Respondent state to the cashier that he wanted to make an exchange. Byron explained that he observed the Respondent remove the two purple cans off of the shelf, but when he approached the register he only had one can in his hand. Byron stated that he did not have it under his arm because he would have observed it when he stood behind him. He testified that the Respondent removed the second purple can from his bag. Byron stated that when he took the cans of formula, the Respondent followed him to the back room stating that the cans were his. He denied that the Respondent ever tried to explain to him in the back room that he was just trying to make an exchange with the formula in his bag.

Byron explained that once the police arrived at the store, they took over the investigation. He stated that they reviewed the case and decided that the Respondent would be arrested for petit larceny. Byron acknowledged that he had to agree to press charges for the police to further the investigation. Byron stated that he could not recall if he signed something under the penalty of perjury stating that he observed the Respondent trying to steal something.

On redirect examination, Byron stated that when the Respondent approached the cashier, he only had the two cans of formula on the counter when he mentioned about an exchange. He stated that he did not observe the Respondent attempting to open his bag to remove any other cans of formula. Byron testified that if the Respondent were allowed to make the exchange between the two purple cans, he would have been obtaining a can of formula that he did not pay for. Had he left the store following the exchange, he would have been in possession of store property he did not pay for and could have been arrested at that time. Byron stated that he did not hear the Respondent state that he wanted to pay for any additional cans of baby formula.

During further cross-examination, Byron explained that if a customer comes in with a Rite Aid product not purchased at their store they can make an even exchange. He further explained that the person can exchange the Rite Aid product for the more expensive product if they were to pay the difference in price. Byron said he would not tell the person to leave the store simply because they had Rite Aid merchandise that they did not purchase at that store. Byron acknowledged that the customer may not receive a cash refund but they could exchange the item for other merchandise.

During questioning by the Court, Byron stated that it is the same policy to do an even exchange without a Rite Aid receipt. He explained that a person with a Rite Aid product could come into his store make an exchange without a receipt and be given the same even exchange policy.

Earle Wilkinson

Wilkinson is an assistant manager with the Rite Aid Corporation. He testified that he has been with Rite Aid for the past 19 years. Prior to becoming a manager, he was a lost prevention officer for 15 years. On January 30, 2006, Wilkinson stated that he was a lost prevention officer. As a lost prevention officer, Wilkinson said that he worked in stores that had serious problems with shop lifting. On the particular day in question, he worked at the [REDACTED] store which was a really "bad one," with respect to shoplifting. Wilkinson said he would monitor people who entered the store from the back room. On the date in question, his partner was Byron.

On January 30, 2006, Wilkinson testified that he was in the back room monitoring people who entered the store, when he observed a young man walking with a book bag, hat and jacket. The male (later identified as the Respondent) proceeded straight to the baby aisle where the milk and diapers were located. Wilkinson stated that when people enter that aisle, they normally monitor them because shoplifters generally steal baby products when they do not have money. Wilkinson said that he observed the Respondent pick up "two cans of milk" and walk toward the register. While he was on his way, Wilkinson noticed that the Respondent slipped off his bag and slipped one of the cans of "milk" in his bag. The Respondent then made his way to the door and Wilkinson noticed

that instead of two cans he only had one. Wilkinson said at that point he and his partner left the back room and went to the front of the store to really monitor with their own two eyes what the Respondent would do next. He positioned himself about five yards from the exit door which was not very far from where the Respondent was standing to go to the register. Byron was not too far away either.

Wilkinson stated that he observed Byron get closer to where the Respondent was to hear what the Respondent was going to say to the person at the cash register.

Wilkinson said he was not close enough to hear the conversation. He observed the Respondent go into his book bag and take out another can and put it on the register while he was speaking to the person at the cash register. Wilkinson then observed Byron pick up both cans and tell the Respondent to leave the store. He stated that he was able to hear Byron make that statement. The Respondent inquired of Byron what was he talking about. Byron informed him that those milk cans belonged to the store and then Byron proceeded toward the back room and the Respondent followed him. Wilkinson said he then followed the Respondent toward the back. In the lunch room area the Respondent stated that the formula was his and that he came to the store to make an exchange. They then informed the Respondent that he was observed picking up two cans of formula on his way to the register and slipped one in his book bag. The Respondent insisted that he only picked up one can from the shelf. The Respondent explained that he usually received formula from the Women Infant and Children (WIC) program. He explained that the formula he received from WIC was not the kind he needed for his baby, so he tried to make an exchange for the right one. Wilkinson said that the Respondent did not have a receipt in his possession.

Wilkinson stated that the Respondent continued to say that he was a police officer, that he only picked up one can not two and that he wanted to make an exchange with one of the cans he had in his bag. He also stated that since he was a police officer, why would he do something like that. Wilkinson said at some point his partner left the back room and went to the front to call the police. Upon his partner's return, he informed him [Wilkinson] that the Respondent said he was a police officer and so they went back to review the video tape to make sure whether one or two cans were picked up. Wilkinson said at some point while they were watching the tape the Respondent walked out of the lunch room and noticed on the tape that there were two cans of formula picked up and stated that he wanted to leave. He never forced the Respondent to stay and that the Respondent walked with them to the back. The Respondent then proceeded to leave all of the formula in the back and was heading to the door when the police officers walked in and brought him back.

During cross-examination, Wilkinson acknowledged that he gave a tape-recorded statement to the police about the incident. Wilkinson denied in that statement that he and his partner asked the Respondent to come to the back room with them. Wilkinson was given an opportunity to review the statement and after reviewing the statement he recalled stating in his first interview that he and his partner asked the Respondent to come to the back room with them. Wilkinson stated that he did not actually hear his partner ask the Respondent to come to the back room and he stated that the two of them proceeded and he followed them. Wilkinson acknowledged that Byron was being sued with respect to the arrest of the Respondent. He stated that he was not fully aware of the details because Byron did not sit him down and explain the details of the lawsuit to him.

With respect to his memory regarding going to the back room, Wilkinson explained that initially he thought that his partner Byron told the Respondent to go to the back room but then at some point he remembered that Byron simply walked with the formula and the Respondent followed him to the back room. Wilkinson was asked whether someone told him to say he never asked the Respondent to come to the back room and Wilkinson denied that. He also denied ever talking to Byron about his testimony regarding his lawsuit. Wilkinson said he did not lie when he initially told the police that they asked the Respondent to come to the back room. Wilkinson acknowledged that he was probably mistaken when he stated to the police on the night of the incident that he and his partner told the Respondent to go to the back room.

Wilkinson stated that he worked approximately nine years, four days a week with Byron as partners in the lost prevention unit. He acknowledged that they worked as partners, and pretty much knew each other as they tried to discern where the theft was coming from. Wilkinson acknowledged that to charge someone with stealing from the Rite Aid store, the person would actually have to leave the store. He admitted that on January 30, 2006, the Respondent never tried to leave the store. When Wilkinson was asked why the Respondent was asked to come to the back room, Wilkinson explained that the Respondent was demanding that the formula was his, and he knew that the Respondent picked up the formula while in the store. Wilkinson could not recall if the two cans that were placed on the counter were the same brand. He did note that the Respondent had one can in his hand and obtained one of the other cans from his bag. He also noted that the Respondent wanted to make an exchange, and if the Respondent exchanged the formula he placed on the counter, he would have been leaving with one of

Rite Aid's formula which he did not pay for. Wilkinson stated that he did not recall telling the investigator on the night of the incident that he told the Respondent to come to the back because they did not want to create a scene in front of the store with people. He later acknowledged that sometimes he requests people to come to the back so it does not create disturbance in the store.

Wilkinson stated that they did not want to process the Respondent's arrest. They merely sought to obtain the formula from him and have him leave the store. He stated that it is within their discretion to decide whether or not to have someone arrested. It was not until the Respondent insisted that the formula was his that his partner called the police. Wilkinson stated that he was unaware that his partner was calling 911 at that time. Wilkinson acknowledged that the Respondent told him that he wanted to exchange the formula for a particular formula that his baby uses. He acknowledged that the Respondent voluntarily showed him the other cans of formula that were in his bag. He also recalled the Respondent mentioning that he received formula from the WIC program.

During redirect examination, Wilkinson stated that at no point did he or his partner put the Respondent under arrest. He stated that he does not physically arrest people; that the police place individuals under arrest. Wilkinson stated that he was not being sued in connection with this Rite Aid case.

Patricia Clifton

Clifton is a community service aide with the WIC program. She testified that she has been with the agency for the past 20 years and that her agency gives formula and food to children and infants. Clifton stated that her agency is sponsored by the public health solutions organization but it is a federally funded program. She is a community service aide and performs clerical duties which include insuring that people are eligible for the WIC program. She conducts interviews to see if they are qualified and then she sends them to a nutritionist who will finish up their application process. She said that her program provides formula for infants up to the age of one; and food and formula for children from one to five years old. For example, the program provides juice, cereal and eggs.

Clifton testified that eligibility for the WIC program depends on income. She stated that the program looks at the household income and if the income is high, the person would not qualify for the program. Generally, she said people provide their pay stubs; occasionally they provide their tax returns. Mothers generally enroll their children in the program but if fathers are raising the children alone, they can also enroll their children in the program. Clifton stated that the program provides checks to the participants with an appointment date. If the child is an infant, they are given a one-month supply of checks and a return date to return the next month to see if the food provided was appropriate. Following the initial appointment, they will receive checks for two to three months and then get a return date to revisit the agency. The checks specifically outline what products can be purchased. Clifton further explained that it was not that the checks were cashed but that the checks were redeemed for merchandise.

WIC issues an identification card and generally the mother's name is on the card as well as a proxy. The mother would then sign a proxy form and then the proxy would be able to redeem the checks for food. Food can only be redeemed at stores which participate in the WIC program. Clifton said that the unit does not perform any additional investigation into the income of the mother. Once the mother provides a pay stub, there is an additional investigation performed by her unit. She explained that there is an investigation section of the WIC program which can conduct investigations but generally that is not done. Clifton stated that she does ask the mother whether the father has income and is working and she is stuck with the answer provided by the mother.

Clifton testified that the WIC program provides Enfamil brand formula to its participants. If the child requires any special formula, a doctor's note is required so that a special formula can be requested for the child. Clifton stated that participants are not permitted to swap the formula to get a different baby formula at the store. In addition, if the child is not living with the father or contributing to the welfare of the child, the father can not be placed as a proxy on the WIC card. Clifton was shown two documents in evidence; she identified the WIC card (DX4) as well as the WIC checks (DX5).

During cross-examination, Clifton acknowledged that the purpose of the WIC program is to quickly provide nutrition for new born infants. She acknowledged that the application process usually takes place within a day. Clifton admitted that there are no WIC stores but that any store that sells Enfamil usually accepts WIC checks. Clifton acknowledged that she relies on the honesty of the person presenting the information to her to process the application.

Clifton stated that she has no way of knowing how the vendors keep their supply of baby formula. In other words, she does not know whether they keep a tally on the formula that is purchased by way of WIC versus formula purchased in another manner. She also stated that she has no way of knowing if a person came in to exchange a WIC formula for another brand of Enfamil formula and whether the vendor would allow them to do that. She did state that it is against the law for a WIC recipient to exchange one brand of formula for another without getting a doctor's note to make the change. Clifton stated that she has no information regarding the investigation involving the Respondent's wife and that investigations are handled by a different unit.

DX 10 is a certified copy of the New York Department of Health (NYDOH) investigation into the wife of the Respondent, [REDACTED] Malcolm (Malcolm). The preliminary review states in sum and substance that an investigation was conducted into the WIC status of Malcolm and found that Malcolm registered herself and her son for WIC, but that there was no paperwork on the Respondent, nor was his income listed in Malcolm's application. The record further contained a statement by Malcolm. She indicated that she applied for WIC and failed to mention the Respondent's income because no one asked her for it. She declined to sign a release for her tax returns. She did, however, provide a copy of her 2006 tax returns where she was listed as head of household and the Respondent's income was not mentioned. [REDACTED]

[REDACTED]. Bruce Washington, Supervising Investigator of the Bureau of Special Investigations at the NYDOH accessed online public records to determine an estimate of the Respondent's salary at the time not including overtime earnings, night-shift differential, holiday pay and uniform allowance. The Respondent salary was estimated at

over \$59,000.00. Washington determined in sum and substance that Malcolm and her son were ineligible for WIC and that Malcolm misrepresented circumstances by not mentioning the Respondent's income. Malcolm was required to repay the agency \$343.31. Attached was an agreement signed by Malcolm and witnessed by Washington agreeing to repay the money owed.

Sergeant Kevin McMillan

McMillan is a 14-year-member of the Department currently assigned to the 73 Precinct. He stated that he has been in the rank of sergeant for four years. On January 30, 2006, McMillan was the field training unit sergeant at the station house. On the day in question, he responded to a Rite Aid location based on a call from a security officer who stated that he was holding a member of the service for shoplifting. It took him approximately seven to eight minutes to arrive at the location and he was met by the security officer who pointed out the Respondent as the person who had been shoplifting. McMillan said the Respondent supplied his identification card but he did not supply his Department shield. McMillan said he was supplied with the two cans of Enfamil formula that the security officer said were the Rite Aid products. He vouchered those two Enfamil products. He also received the Respondent's backpack which contained three cans of Enfamil that belonged to him and he vouchered those items separately. The voucher number for the two cans of Enfamil was N038963 (DX6). He explained that that voucher was for two pink cans of the Enfamil which had a blue, pink and gray label marked "Gentlease." McMillan testified that he also vouchered three additional cans of formula,

two were the pink Gentlease formula and one can was a yellow one with a blue and gold seal on it. They were vouchered under voucher No. N038964 (DX 8).

McMillan testified that he also vouchered a video tape he received from the Rite Aid store. He explained that the video tape showed the Respondent picking up some cans of formula and then proceeding to the check out counter. He stated that he made a phone call to the station house that night and was advised to have all the parties report to the station house. He stated that the Respondent was not arrested at the Rite Aid store. He explained that the decision to arrest the Respondent was made by the Brooklyn North Investigation Unit; however, he was designated as the arresting officer. McMillan explained that the Respondent actually received a desk appearance ticket with a date to return to court so he was never physically placed in police custody.

During cross-examination, McMillan acknowledged that because the Respondent received a desk appearance ticket he was actually under arrest. He stated that the Respondent was not free to leave the command. McMillan stated that on the night of the incident, he received two phone calls. The first one indicated that the Rite Aid store was holding someone for larceny and the second call indicated that the person was a member of the service. When he arrived at the scene McMillan stated that he spoke to the Respondent, obtained his identification card and asked him what happened but the Respondent chose not to answer him. McMillan said that he reviewed the video tape and acknowledged that the Respondent at no point during the video tape attempted to leave the store. McMillan said he was not privy to any of the conversations which took place between the duty captain and the Rite Aid personnel.

McMillan was shown a copy of the desk appearance ticket in order to refresh his recollection as to whether the Respondent made any statements to him about what had happened. McMillan reviewed the document and then recalled that the Respondent stated that this was all a "mix up" and that he was trying to do a one to one exchange. McMillan acknowledged that it was not his decision to charge the Respondent with petit larceny.

Sergeant Robert O'Hare

O'Hare has been a member of the Department for over 13 years and is currently assigned to the Brooklyn North Investigation Unit. He has been in the rank of sergeant for almost nine years. He has worked for Brooklyn North Investigations for almost seven years.

O'Hare testified that on January 30, 2006, he received a call out log. He indicated that the log referred to an off-duty incident involving a police officer that occurred at a Rite Aid store within the confines of the 73 Precinct. O'Hare stated that he responded to the 73 Precinct and was met by a Captain [now Deputy Inspector] Terrance Hurson along with two employees from Rite Aid, Byron and Wilkinson, as well as the responding police supervisor McMillan. He explained that Byron and Wilkinson were interviewed that evening but the Respondent was not interviewed. O'Hare said that the video tape which had been secured from the Rite Aid store, was reviewed that evening and that the Respondent was eventually arrested for attempted petit larceny. He was arrested and suspended that same night. O'Hare stated that eventually the case was brought to

arraignment but it was eventually dismissed because the district attorney's office never drew up an accusatory instrument.

O'Hare testified that after the Respondent was suspended and arrested his firearm was seized. O'Hare explained that the Respondent's Kahr K-9 firearm had six cartridges in the magazine and one in the chamber but it was actually short one round. He also stated that the Respondent was not in possession of his shield on the night of the incident. The Respondent had informed him that his shield was affixed to his shirt in his locker at the 81 Precinct. O'Hare further explained that further investigation was done with respect to the weapon. The Respondent's force record was obtained and it was determined that the Kahr K-9 was not listed on his force record which is a Department requirement.

O'Hare explained that a Kahr K-9 is an authorized off-duty weapon but in addition to the paper work, which is notification to the State of New York, there must also be a command log entry regarding the acquisition of the firearm. The command log entry is made at the officer's permanent command. It would then have to be entered on his force record card. The officer then in turn has to present the firearm to the gunsmith at the outdoor range. The officer then would have to qualify with that weapon at the range in order to be permitted to carry it as an authorized off-duty weapon. O'Hare stated that his investigation revealed that the Respondent did complete the proper paper work for the Kahr K-9 in February of 2005, but somehow due to an error, the information was never entered into the Department's database. O'Hare further explained that it was determined that when the Respondent did appear at the range in September of 2005, he did not qualify to carry the weapon at that time making it unauthorized for him to carry it.

O'Hare stated that further investigation into the Respondent's personnel profile revealed that he had telephone numbers that were old numbers in his Department record. Based on his review of the documentation O'Hare stated that the Respondent had not advised his commanding officer of his new telephone number for emergency purposes.

O'Hare testified that based on the information he had from the video, coupled with the statements from security, the Respondent was in possession of three baby formula cans. Two were purple cans which he had obtained from exchanging them at a Rite Aid location at Ralph and Fulton streets. He was also in possession of a yellow can of formula which he had obtained via the WIC program. O'Hare explained that the two security officers made reference to the formula coming from the WIC program and O'Hare also observed a WIC card which contained the name of the Respondent's wife and the Respondent's son. O'Hare further explained that he could not recall exactly when he came into possession of that WIC card but he recalled seeing it that evening. O'Hare identified a document which he called a photocopy of the WIC identification card for Carline Malcolm (DX4).

O'Hare said that his investigation regarding Rite Aid continued into the next morning. He stated that he was working with Sergeant Ann Richards who made a phone call to the other Rite Aid store located at [REDACTED]. She spoke to the lost prevention manager who covered both stores. He informed her that their system did not show any exchanges or transactions involving Rite Aid formula. In addition, their surveillance equipment had not been recording at that time. O'Hare testified that he interviewed additional witnesses with respect to this case. One such

witness was Colin Jacobs, manager of the Rite Aid store.<sup>1</sup> Jacobs had informed O'Hare that he was the store manager on the evening of the incident. After his security officers had interceded, he went to the back and learned that the person involved was a police officer. The Police officer [identified as the Respondent] indicated that he did not want to get his job involved in the matter or he would be suspended. Jacobs also informed him that the Respondent told him he had obtained the formula by doing an exchange at a store on [REDACTED] without a receipt.

O'Hare stated that he also interviewed a woman by the name of [REDACTED] Byrd.<sup>2</sup> Byrd was the cashier working on the night of the incident. She indicated that the Respondent wanted to exchange items but he did not have a receipt. She informed him that she would have to ask the assistant manager and at that point the security officers and one manager approached. O'Hare stated that he also interviewed the Respondent's wife on one or two occasions. She indicated to him that she was aware that the Respondent had gone to a store to exchange formula for another formula pursuant to the WIC program. He could not recall specifically if she told him whether she was a member of the WIC program. During the course of his investigation, O'Hare stated that he also contacted Vicky Thomas of the New York State Department of Health. He made a notification to her and an inquiry regarding the income levels required for the WIC application. Thomas indicated to O'Hare that she would look into the matter and make an inquiry. One year later, O'Hare stated that he got a letter back from Thomas thanking

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<sup>1</sup> Court Exhibit 1 indicates that an effort was made to serve a subpoena on Mr. Colin Jacobs. The investigator was informed that Jacobs no longer resides in New York State, that he has taken up residence in [REDACTED]. DX2 indicates that the investigator learned that Jacob's address was in [REDACTED]. There is no further documentation in the record to indicate that any effort was made to produce Jacobs who resides in [REDACTED].

<sup>2</sup> Byrd was served with a subpoena on April 7, 2009 by "Nail and Mail" substituted service at her last known address provided by the Department of Motor Vehicles. She failed to appear at this proceeding.

him for the information and indicating that they made a determination that the Respondent's wife had to pay them back \$343.31; that she was income ineligible and that they were closing the case. O'Hare stated that a new log was generated in April of 2008 by Assistant Department Advocate Lisa McFadden after conferral with Department Advocate Julie Schwartz. It was recommended that further investigation be conducted into whether welfare fraud had occurred. As part as of his investigation, O'Hare subpoenaed the investigative records from WIC (DX 10). He stated that in sum and substance that the investigation was done on [REDACTED] (Malcolm) the wife of the Respondent. The record contained an agreement between the State of New York Department of Health and Malcolm. O'Hare said that it was basically an agreement for Malcolm to pay the amount owed to the agency of \$343.31. O'Hare explained that Malcolm had received WIC benefits from November 18, 2005 through March 19, 2006. He said the record indicated that the federal annual income threshold for a family of three was \$29,767. The report calculated that the Malcolm family income to be [REDACTED]. O'Hare stated that he did not know how the income had been formulated, but he knew that Malcolm's income was approximately \$30,000 to \$40,000.

O'Hare testified that his new investigation into welfare fraud took approximately six months for him to conduct the investigation and close it in October of 2008. He conducted two Official Department Interviews of the Respondent, one on November 30, 2006 and the second interview on October 28, 2008. During the Official Department Interview held on November 30, 2006 (DX11 and 11a), O'Hare stated that in sum and substance, the Respondent expressed that his son, Joshua, had some problems digesting the baby formula. The particular formula that was provided by WIC was not helping his

problem. Therefore he needed to get a different formula to attempt to help his son's digestive problem. O'Hare acknowledged that the Respondent's wife informed him that she was getting the formula through the WIC program. O'Hare said that during the Respondent's second Official Department Interview held on October 28, 2008 (DX12 and 12a) he was questioned again by the Assistant Department Advocate regarding his knowledge of where the formula had been obtained. O'Hare said that the Respondent made a couple of different statements that were not consistent. He explained that at one point the Respondent stated that he did not know where the formula came from. He also stated that he did not know where the formula that he had in his possession during the incident came from.

During cross-examination, O'Hare acknowledged that there was no evidence in the worksheets to show that he obtained a WIC card from the Respondent on the night of the incident. O'Hare acknowledged that items were vouchered on the night of the incident, i.e., the Respondent's knapsack and hat, but the WIC card was not vouchered. O'Hare explained that he did not voucher any evidence and that any other items that were vouchered including the formulas were not vouchered by him. O'Hare admitted that during the Respondent's Official Department Interview held on November 30, 2006 that the Respondent produced a WIC card at that hearing. O'Hare acknowledged and stated that he did make a photocopy of the WIC card and made no mention during that interview that he had seen that card before. He agreed that upon review of the transcript of that interview, one would conclude that that was the first time he had seen the WIC card.

With regard to the administrative charge of the Respondent acquiring a firearm, O'Hare acknowledged that a command log entry was made at the 81 Precinct in a timely manner with respect to the Respondent purchasing that firearm. O'Hare also acknowledged that usually when the command log entry is made, the second step of entering the firearm on the force card is usually done at the same time. He admitted that the Respondent generally would not have access to the command log to make the entry or to his own force record card. He testified that when the desk officer was made aware of the firearm, he should have at that moment made the entry onto the force card. He stated, however, that there are a number of reasons why the entry may not have been made including that the force record card may not have been accessible at that time. He further explained that ultimately it is the member's responsibility to ensure that his or her own force record card is an accurate reflection of the appropriate captions. O'Hare acknowledged that the Respondent had done everything right including bringing the firearm to the desk, sending paperwork to New York State with the exception of the Force Record card. O'Hare explained that a supervisor has to secure the force record card.

With respect to a member changing his or her phone number or address, O'Hare testified that a member is supposed to prepare and submit PD form 451-021, which is a change of name or social status form. O'Hare said once that form is completed the change is then made on the force record card. The information gets forwarded to the Employee Management Division and someone in that unit makes the appropriate adjustments to the Department's database. O'Hare said the Respondent is also supposed to tell the supervisor who would also make the change to the force record card. He said

during the course of his investigation he did not find that anyone in the Police Department had any difficulty locating the Respondent when they needed to. O'Hare stated that he personally had difficulty once or twice trying to reach the Respondent with the phone numbers he had on file.

With respect to the Kahr K-9 weapon, O'Hare acknowledged that it is an authorized off-duty weapon but a member of service has to be qualified to carry it. He explained that members of the service may carry only their on-duty weapon or an authorized off-duty weapon. However, they are allowed to possess as many other firearms as they would like. He further explained that the Department requires qualification to take place twice a year. He stated that members generally bring their off-duty weapon that they want to qualify with at the time when they go to the range to qualify with their on-duty service weapon. O'Hare acknowledged that his investigation revealed that the Respondent had taken his Kahr K-9 to the range on February 18, 2005 but that there was some type of mistake at the range. There was documentation to support that the Respondent had attended the range but for some reason the information did not enter the database. O'Hare stated that on the September 19, 2005 date, the Respondent did not qualify with his Kahr K-9. He was unable to determine whether the Respondent had reported to the range with his on-duty weapon and did not carry his Kahr K 9 or if he fired the Kahr K-9 and did not qualify. O'Hare acknowledged that the documentation did show that the Respondent had qualified with the Kahr K-9 at some point. He also noted that his investigation into New York State revealed that they had a two-year back log in entering firearm information into their database.

O'Hare acknowledged that the Department has a policy that requires officers to keep their guns fully loaded at all times. He explained that when the Respondent's firearm was seized on January 30, 2006 it was not fully loaded. He further explained that this meant that you have to fully load the magazine, put a round into the chamber, remove the magazine itself, then top off the magazine with one extra cartridge, reinsert the magazine, and then you have a fully loaded weapon. He explained that the Department mandates that weapons be "hot" and hot means ready to fire even if it is with one hand only. When asked whether this was a requirement for members of the service to carry their off-duty firearms, O'Hare stated that specifically in the Patrol Guide there is a procedure requiring that weapons must be carried in accordance with the Department's guidelines. He further explained that this section specifically addresses authorized weapons while on or off-duty and does not state while off-duty you can have one less round.

O'Hare acknowledged that if an arrest of an officer was going to take place one of the first things to be done would be to remove his firearm. But he explained that the patrol sergeant taking the firearm may not necessarily check the number of rounds in the firearm at the time he secures it. If an allegation was made against the officer for firing his weapon one of the first things that would be done would be to check to see if any rounds were missing. O'Hare explained that there are circumstances where you might secure a firearm from a member of service but can not immediately check it. For example, he stated that if he secured a firearm but then he had to lodge a prisoner, he would not unload the member of service's firearm at that time or if he were going to voucher it later, he would not unload the weapon at that time.

O'Hare acknowledged that the Respondents case was never written up by the District Attorney's Office. The Respondent showed up as ordered with respect to the desk appearance ticket but nothing ever came out of that. O'Hare admitted that his investigation was closed with the Rite Aid incident as well as all the other administrative infractions. O'Hare noted that although there were allegations of welfare fraud from the night of the incident, his case never contained such. It was not until a second log at the direction of the Advocate's Office that further investigation was done into the welfare fraud issue. As part of this new investigation, O'Hare stated that he subpoenaed records from the New York State Department of Health. O'Hare testified that based on his investigation and conferral with his Commanding Officer, the case was closed as unsubstantiated as to welfare fraud because they could not prove or disapprove what part the Respondent played in his wife's participation in the WIC program.

O'Hare explained that his case was closed in June of 2008 and it was requested that it be re-opened. There was a second Official Department Interview of the Respondent and then the case was closed again in October of 2008. O'Hare testified that he never found that the Respondent impeded his investigation. O'Hare explained that even though the case was re-opened, his findings were never changed and his case remained unsubstantiated. Following the second interview of the Respondent, a decision was made by the Department Advocate's Office to serve additional charges. O'Hare acknowledged that during the course of his investigation, incorporating the New York State Department of Health Bureau special investigations file, he never found any evidence that the Respondent was ever in possession of any of the WIC vouchers. He also never found any paperwork pertaining to the WIC application which contained the

Respondent's name. O'Hare admitted that the Respondent's wife had filed the application, that she noted that they filed separate returns and that they had an on and off relationship at the time that she filed her WIC application and that no one inquired of her regarding her husband's income.

During Malcolm's interview held in March of 2007 she informed O'Hare that she was aware that on the night of the incident that the Respondent was going to try to exchange the WIC formula for the Gentlelease. She further explained that she had previously done that type of exchange herself.

O'Hare stated that following his additional investigation, he did not find any evidence that the Respondent while acting in concert with another, knowingly misrepresented circumstances in order to obtain benefits. He also did not find that the Respondent intended to benefit himself or any other person by possessing stolen property, i.e., WIC formula from the WIC program. He further found no evidence to support a charge that the Respondent knowingly and with the intent to defraud made a false statement or gave false information in order to be eligible for public assistance or benefits from the WIC program. O'Hare said that petit larceny, welfare fraud, criminal possession of stolen property are all criminal charges and the Respondent was never arrested in this matter. O'Hare said that he never did a consultation with the Kings County District Attorney's office and was never directed to do so. He also stated that he was never directed to contact the Attorney General's office. O'Hare acknowledged that it was on his notification that an investigation was done into Malcolm and that she was never arrested but was directed to pay back the \$340.00.

During redirect examination, O'Hare stated that he could not remember why he recalled seeing the WIC card on the night of the incident; he just recalled seeing it and remembering that the Respondent's name was not on the card. O'Hare explained that he did not ask Malcolm whether she had discussion with the Respondent regarding details of the WIC program.

Upon questioning by the Court, O'Hare testified that he thought his questions were clear when he asked the Respondent where the formula came from. He thought his questions referred to the formula coming from the WIC program. He explained, however, that it is possible that the Respondent thought he was referring to the store that the formula was purchased from. With respect to the eligibility requirements for the WIC program, O'Hare stated that in the initial Official Department Interview, the Respondent as well as he did not seem to have a clear understanding of the requirements. By the second interview, the Respondent stated that he did some "homework" with respect to the eligibility requirements for the WIC program.

During further cross-examination, O'Hare acknowledged that the Respondent was not required to repay any money back to the WIC program. O'Hare stated that the Respondent was completely wrong in his first Official Department Interview when he stated that any woman and child are entitled to be enrolled in the WIC program. The Respondent also stated in a decisive manner that income had nothing to do with eligibility for the program. O'Hare acknowledged that during the first Official Department Interview welfare fraud was not an allegation. He admitted that the second interview involved the WIC program, welfare fraud, or whether the Respondent was eligible to be a part of the program.

Lieutenant Timothy Anderson

Anderson is a 12-year member of the Department currently assigned to the 90 Precinct Detective Squad. He testified that he has been assigned to that command for the past 18 months and has been in the rank of Lieutenant for three years and three months. Anderson stated that in December of 2004, he was a sergeant assigned to IAB Group 31. He said that he had been in the rank of sergeant at the time for two years. On December 8, 2004, Anderson stated that he received a call out regarding the Respondent at about ten o'clock that morning. The call out came from the district attorney's office and the allegation was perjury with respect to a grand jury appearance by the Respondent. Anderson said that the Kings County District Attorney's Office alleged that there was an operation involving the Respondent and a CI within the confines of the 81 Precinct. They did three buys in a building on Chauncey Street. A search warrant was prepared, affidavits were drawn up, and a complaint report was done. They executed the search warrant on November 3. The allegation was that at the time of the grand jury hearing, the Respondent testified leaving out the CI. He stated that he made the purchases instead of the CI making the purchases and he [the Respondent] observed the buys.

As part of his investigation, Anderson testified that he collected documents prepared by the Respondent in connection with this matter. He stated that the Respondent prepared three DD5s dated July. He stated that the DD5s referred to three control buys that took place prior to the acquisition of the search warrant.<sup>3</sup> He stated that the dates were July 22, 2004, August 5, 2004 and October 22, 2004. Each of the three DD5s were prepared by the Respondent and signed by him and each indicated that the CI

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<sup>3</sup> Anderson defined the DD5 as a Police Department worksheet that is prepared by detectives in addition to their complaint reports and online booking sheets.

made the purchases while being ghosted [observed] by the Respondent. (DX 13a, DX 13b, DX 13c) Anderson testified that as part of his investigation, he also obtained a search warrant affidavit as well as the transcript regarding the search warrant which was sworn in front of Justice Plummer Lott. He explained that the transcript was the warrant application that was sworn out by the Respondent and it was done in the presence of the CI. (DX 14 and DX 15). Anderson stated that he was able to establish that the search warrant was in fact executed and that three arrests were made as a result of the execution of the search warrant and he believed contraband was seized. The arrests took place on November 3, 2004. As a result of the arrests, Anderson stated that the case was presented before the Kings County Grand Jury. One arrestee pled guilty before the presentment before the grand jury and two of the other arrestees were indicted as a result of the grand jury. He stated that the results of the criminal case were that all three arrests were dismissed and sealed. Anderson testified that from April 2, 1997 through November 2, 2004, the day before the search warrant was executed, the Respondent made a total of 68 arrests, three of which were for narcotics related offenses.

Anderson testified that as part of his official investigation, he conducted an Official Department Interview of the Respondent on April 20, 2005. He questioned the Respondent with respect to his grand jury testimony. He stated in sum and substance that the Respondent stated that he made the purchases in his grand jury testimony and left out the CI and that this was a simple mistake. He also indicated that what had in fact took place was that he utilized the CI to actually make the purchases and that he was in very close proximity to the CI as he observed all three buys.

During cross-examination, Anderson acknowledged that the Respondent's arrest record does not illustrate how many times he may have been exposed to narcotics during his career. He agreed that the Respondent could have been exposed to narcotics during the course of other arrests where the top charge was not a narcotics offense. He admitted that all police officers who complete the police academy do receive some narcotics training. Anderson also agreed that based on his personal experience as a police officer, sergeant and a lieutenant, the fact that the Respondent worked in the 81 Precinct and other commands, he likely was exposed to more than simply three arrests involving narcotics. Anderson acknowledged that the district attorney's office noticed several problems with this undercover operation. One problem was that the undercover was also the arresting officer and that does not usually transpire in narcotics cases.

Anderson acknowledged that during the course of his investigation, he did interview the CI with regard to what had transpired. The CI corroborated that the Respondent was next to him during all three buy transactions and he believes that the Respondent did see him exchange money for drugs. Anderson stated that he went to the location and he described it as dangerous and he explained that he went to the location in the middle of the day. He said it was a known drug prone location. Anderson acknowledged that the Respondent went into these buildings with the CI without any police back up close by. The Respondent also entered the location with the nearest member of service approximately one city block away and he had no radio with him at that time. Anderson agreed that the way these three narcotics buys took place was not the typical pattern for drug buys. Anderson agreed that his investigation did not reveal anything other than the police officers trying to fight crime and that in no way were they

trying to cut corners or being lazy in the way they conducted themselves during this operation. Anderson agreed that no one else received discipline with respect to this matter and he also stated that the Respondent probably should not have gone into this operation with the CI alone attempting to buy drugs at that location. He agreed that members of the service who do conduct these high risks types of jobs are specially trained by the Department. He acknowledged that the narcotics training is approximately two separate weeks before one enters the Organized Crime Control Bureau to work. He admitted that by all accounts the Respondent had volunteered to conduct this type of work. Anderson agreed that the type of operation conducted with the CI would never have been charged under normal police department procedures. He agreed that when a CI purchases narcotics the Police Department never charges the seller with that sale in an effort to keep the anonymity and confidentiality of the CI. Anderson acknowledged that he learned from one of the executives at the district attorney's office that those indictments should never have taken place based on sales made to the CI.

Anderson acknowledged that he interviewed Assistant District Attorney (ADA) Whitenack in connection with the grand jury testimony. He acknowledged that Whitenack stated that he only spent a short time preparing the Respondent before he testified before the grand jury. The ADA also admitted to making mistakes in connection with the presentation of this case before the grand jury. He agreed that Whitenack stated in retrospect that he should have looked at the paperwork carefully and noticed the conflict between the paperwork and the testimony in the grand jury. Anderson acknowledged that the Respondent's preparation of the DD5s was accurate and that normally, police officers do not prepare DD5s, that they write in their activity logs.

Anderson agreed that the Respondent went before Judge Lott to obtain the search warrant and that his statement before the judge in the presence of the CI was accurate.

Anderson acknowledged that he did a lengthy investigation into this matter. He admitted that he spoke to ADA Charles Guria who is the ADA in charge of prosecuting police officers. He noted that Guria declined to prosecute the Respondent in this matter. Anderson agreed that the case went full circle and that the district attorney's office made the initial call out, that IAB did the investigation and that in the end the district attorney's office decided not to prosecute the matter. Anderson also agreed that when the IAB case was closed, it was the opinion of the investigators as well as his commanding officer that a mistake was made accidentally by the Respondent. Anderson agreed that the Respondent had to be directed by some supervisor in order to get the search warrant to go before a judge in the presence of the CI.

During redirect examination, Anderson acknowledged that his IAB group did substantiate an allegation against the Respondent. They substantiated the incorrect testimony made at the grand jury proceeding made by the Respondent. Anderson acknowledged that this was a different charge than the perjury charge that the district attorney's office was seeking. Anderson stated that there were additional charges aside from the ones that were indicted. As a result of the execution of the search warrant, there were drug possession and drug paraphernalia charges which were also dismissed. Anderson testified that he questioned Whitenack with regard to when he received the police report and he had received them the morning of the grand jury proceedings. Whitenack did indicate to him that he did review the police report. Whitenack also indicated that he only spoke with the Respondent for a couple of minutes before he

testified before the grand jury. After review of his notes regarding the interview he conducted of Whitenack, who informed him that the Respondent stated in his presence, as well as in the presence of Whitenack's supervisor, that he [the Respondent] made the buys.

During further cross-examination, Anderson said his recollection was refreshed to the fact that Whitenack stated he should have reviewed the paperwork in more detail and should have noticed the conflicts in the paperwork; and had he done that, he probably would not have put the case on before the grand jury. Whitenack also stated that at some point during his preparations, the Respondent did mention working with one CI.

During further redirect examination, Anderson acknowledged that the Respondent informed Whitenack that the CI assisted in gathering information for the sale but that the Respondent stated that he made the buys.

#### The Respondent's Case

The Respondent called Captain William Taylor and testified in his own behalf.

#### Captain William Taylor

Taylor testified that he had been with the City of New York for approximately 17 years but has been assigned to the Police Department a little less than 15 years. He stated that he has been in the rank of captain for approximately four months and is currently assigned to the 60 Precinct, where he serves as the Executive Officer. When he arrived at the 81 Precinct in December of 2003, he was the day tour platoon commander. He noticed that the day tour activity needed improvement in terms of arrests and other

activities. About the same time that he was working at the command, the Respondent and another police officer were transferred to his command. He noted that the Respondent and the other officer had good work ethics, strong arrest and summons activity and he wanted to utilize them to get the "ball rolling" to get other members of the service motivated to do their job and enjoy it. He stated that with their permission, he utilized their experience to improve the numbers in the command. He noted that in a short space of time, numbers skyrocketed and everyone was being more productive. He stated "I couldn't have done it without him, I don't think," referring to the Respondent. Taylor explained that there were approximately 25 officers assigned to that platoon and he felt that the impact of the new work ethic was spreading throughout the group.

Taylor testified that although the Respondent was assigned to regular patrol, he did more plain clothes training and work with Anticrime. He explained that the Respondent did have interaction with CIs during that time. He explained that a CI is someone who has information on criminal activity and who is willing to work as a liaison for the police in order to gain criminal information. Taylor stated that to the best of his recollection, the Respondent began to work with a CI because he had made an arrest of a perpetrator for a sexual assault. While the victim was at the station house, her husband expressed to the Respondent that he had information regarding crack cocaine being dealt within the confines of the precinct and he was willing to make buys on behalf of the Police Department in exchange for money. The CI worked with the Respondent along with Sgt. Fillipedes. Taylor stated that from what he recalled, the CI made three separate buys at a location known to the Department. The Respondent's specific role in the

operation was to observe the transaction between the CI and the seller without being observed or to raise any suspicion of the seller. Taylor explained that the Respondent was an African-American and he volunteered to work in this assignment.

With respect to the narcotics operation involving the CI, Taylor testified that the Respondent entered the location without police back up next to him. He stated that the operation was very dangerous. He noted, out of the three narcotics buy operations, the search warrant was executed and arrests were made of the subject as well as several other people in the apartment. Taylor did not believe that the Respondent had any narcotics training prior to engaging in this operation. Taylor stated there was nothing wrong with the Respondent participating in this type of operation under his supervision. He said that the Respondent was responsible for doing the paperwork in this case and that he would have been under the supervision of Fillipedes at that time. Taylor stated that he did not work with the Respondent with regard to his testimony in the grand jury or securing a search warrant. He stated that he supervised the Respondent for approximately six months. Taylor testified that with regard to the work that the Respondent performed, he had been a supervisor for approximately nine years and that the Respondent was the "best cop I ever had." He said he was the best performer he ever supervised.

During cross-examination, Taylor stated that he supervised the first narcotics buy operation and possibly the second. He said that Fillipedes instructed the Respondent on what was needed to be done and what paperwork needed to be completed. Taylor was shown a copy of one of the arrest reports for the narcotics buy. He acknowledged that the arrest report stated that the Respondent had made the sale to the narcotics person when, in fact, it was done by the CI. Taylor stated that he was not aware that the three arrests,

connected to the narcotics buy were ultimately dismissed. Taylor acknowledged that having the arrests dismissed did not help his overall goal of improving police activity in his command. Taylor denied ever advising the Respondent to put incorrect information regarding the CI in his reports. He also denied giving the Respondent advice to give incorrect information to the grand jury regarding the use of the CI.

Upon questioning by the Court, Taylor acknowledged that CI's are given special status within the Police Department. He stated that members of the service usually refer to the CI's by a number and that their name is never revealed.

#### The Respondent

The Respondent testified that he joined the Department in June of 1994 as a police cadet. He spent two years as a cadet and was promoted to the rank of police officer. After graduating from the Police Academy, the Respondent stated that he was in the 84 Precinct, 81 Precinct, and the Queens Warrant Section and currently is assigned to the Manhattan Court Section. He stated that he has made approximately 160 arrests in his career.

In January of 2004, the Respondent testified that he was assigned to the 81 Precinct. Taylor was his platoon commander during the day tour. He believed Taylor was at the 81 Precinct prior to his arrival. He was briefed on the requirements for the day tour. He stated that he had a private conversation with Taylor regarding special duties that he wanted him to undertake. The Respondent explained that Taylor came to him and asked him if he was interested in working Anti Crime/Conditions. He also informed him that he felt he was still a motivated member of the service and for him to ask around to

see if any younger members of the service were willing to be part of the team. Taylor explained that he was looking to increase the numbers on the day tour platoon. The Respondent stated that he accepted the offer made by Taylor. He was also able to recruit six members to work on the team. He said that there was a big turnaround in the 81 Precinct. Crime numbers went down while arrest and summons activity went up. The Respondent said Taylor was pleased with the productive aspects of the day tour. The Respondent explained that search warrant numbers were down in their command. He met a man who was willing to work as a CI for his command. The Respondent explained that he had arrested someone who had sexually assaulted the male's wife. When the male came to the station house, he made the Respondent aware that he knew of drug sales and was willing to work as a CI. The Respondent introduced the CI to Taylor and he advised Taylor and the Respondent of active narcotics locations within the confines of the precinct where the individuals were willing to sell drugs. The Respondent said he was able to corroborate this information by speaking to his sergeant who did observations on the locations and confirmed the information. The Respondent agreed to "ghost" the CI or follow him to drug prone locations and witness the drug sales. The Respondent explained that he received no narcotics training with respect to doing this type of undercover plain clothes work. Two main locations were located on Howard Avenue and Chauncey Street, Brooklyn.

The Respondent testified that to conduct the undercover operation, he would report to the station house where he was briefed by Taylor and the CI regarding the location. He would dress "down" in dirty clothes and dirty sneakers to fit in with the look of the area. He drove an unmarked car to a block within the vicinity of the location

and had marked money, \$10s and \$20s with which he would be able to purchase crack cocaine. He would leave the car and report to the drug site and make an effort to observe the operations. The Respondent stated that he went to the location on three separate dates and he observed hand-to-hand drug transactions take place. He went to the location with the CI who went to the second floor, knocked on the door, a woman handed him drugs, he handed her the money and they walked out. Once the transaction was completed the CI handed him the drugs. The Respondent placed the drugs in his pocket and returned to his car. He was debriefed on what transpired and then he reported back to the station house where he prepared reports. The Respondent noted that he prepared DD5s [narcotic reports]. He mentioned the CI throughout the paperwork. He was no more than one to six feet away from the CI during the drug transactions. He was supplied with a narcotics manual and he used that to figure out how to fill out the forms. He stated that it was "basically trial and error when filling the report out." The Respondent said that he, along with the commands in Brooklyn North, and the narcotics supervisor Fillipedes sat down and discussed getting a search warrant.

The Respondent testified that he went to the Kings County Grand jury to get the search warrant. He was debriefed by the ADA on search warrants to see if they qualified for the application. Once they were debriefed and qualified the ADA drafted the application and they went before Judge Plummer Lott. Essentially the judge inquired about the location where the Respondent had seen everything alleged in his application and the judge also spoke to the CI. The Respondent said that the CI was mentioned in the affidavit for the search warrant. The Respondent said that later the search warrant was executed; that he was present for that execution and that there were arrests made as a

result of the search warrant. Approximately four hours after execution of the search warrant and the arrests were made, the Respondent was contacted by the district attorney's office. He explained that he met with the ADA on the case for approximately "5 minutes." He said they talked in the hallway where there were other undercover and narcotics teams also having discussions. It was a very chaotic and a rushed process. The ADA would ask for the paperwork and the Respondent would turn in his entire folder. That was the extent of the interview. The Respondent said his folder included DD5s, photocopies of the money, the arrest report, and vouchers for the narcotics envelope, for example.

The Respondent stated that he had an opportunity to review his testimony from the grand jury. He testified that he did not mention the CI during his grand jury testimony. When asked why he did not mention the CI, the Respondent stated, "I thought it was an honest mistake. I thought you never had to mention the CI. I left him out. There was nothing intentional or malicious." He explained that he thought he had to protect the identity of the CI and that is why he did not mention him. The Respondent said he was never corrected during the course of his testimony. The Respondent said he testified leaving out the CI on three occasions during his testimony involving each buy and ADA Whitenack never corrected him so he thought he was doing the right thing. He stated that Whitenack never asked him if he was with anyone nor did he mention the CI during the grand jury testimony. The Respondent said once he finished testifying there was another case planned and he was told, "Thank you have a good day."

The Respondent stated that he learned at a later date that there was an investigation regarding his grand jury testimony. He stated that he was questioned by

IAB and informed them that he made a mistake. The Respondent said he was never modified as a result of this matter.

The Respondent testified that at the end of 2005, early 2006, he was living in [REDACTED] with his wife Malcolm. They have been together since college approximately [REDACTED]

[REDACTED]. He further explained that it was a bad time. He said that the baby was not taking formula and so the stress of the relationship coupled with the baby not adjusting to formula made for a difficult relationship. He stated that they tried between five to six different formulas but the baby would not sleep through the night until they were able to find the Gentlelease which was for fussy babies with gas.

The Respondent estimated that it was in December or January of 2005 when they finally found the formula that worked. He said that either he or his wife would pick up the formula. The Respondent said he did not know specifically where Malcolm picked up the formula, but at some point he became aware that she was using the WIC program. The Respondent explained that they did not have a specific discussion about WIC, but once they began using the Gentlelease formula, there were still old brands of formula left in the house. Malcolm would inform him that those formulas came from the WIC program. He stated that he did not know the particulars about the WIC program.

On January 30, 2006, the Respondent explained that he worked a tour from 8:00 am to 4:35 pm. He stated that he considered taking paternity leave effective on that date but things were not going well between him and his wife and he felt that taking a leave would not help their situation, so he reported to work. Before leaving the house, he picked up three cans of formulas that were in the house called Enfamil Lipil in a yellow and white can. He placed the three cans in his knapsack with intentions of making an exchange at the store for those formulas because they no longer worked for his son. After work he went to the Rite Aid store located on [REDACTED] and was able to exchange two of the formulas because they only had two of the Gentlelease brand. Gentlelease was more expensive than the Enfamil brand and the Respondent paid approximately \$1.50 for each can that he exchanged. The Respondent explained that when he left the first Rite Aid store, he had two cans of Gentlelease which were in purple cans and one can of Enfamil in the yellow can. The cashier informed him that they would not get more formula in until the end of the week, but recommended that he go to another store which he stated was on [REDACTED].

The Respondent stated that he went to the [REDACTED] store. He spoke to a female who directed him to their baby formula aisle where he picked up the last two cans of the Enfamil Gentlelease. He explained that he picked up two cans because finding the formula was scarce. He said his plan was to exchange the yellow formula that he had and to purchase the other can. The Respondent stated that he reviewed the video tape of his stop in the store at least one hundred times. He wanted to explain what was shown in the video where it appeared that he had two cans in his hand and then the camera showed him having only one can of formula in his hand. The Respondent explained that he

picked up the two cans off of the shelf which was stacked on top of each other. He proceeded straight to the cashier without browsing in the store because he was not doing any further shopping. As he proceeded to make the left turn, his bag fell off of his shoulder and as he tried to grab the bag before it hit the floor, he took one can and placed it under his arm and had the other can in either his right or left hand. He pulled his bag up and proceeded to the cashier.

The Respondent denied placing either of those two purple cans that he picked up off the shelf into his bag. He stated that the other can was not inside his jacket but was on the outside of his jacket. He also stated that he never attempted to leave the store. The Respondent said he had to walk past the door to get to the line where the cashier was and he did that. He waited on line and he said his bag was falling and he tried to adjust it on his shoulder. He stood on line until the cashier said, "Next." The Respondent said he walked up to the cashier and informed her that he wanted to exchange one can of formula and purchase another can. She said that was okay and that she would get the manager. By the time she said she would get the manager, the Respondent said he was tapped on his left shoulder and told "I caught you, you're under arrest." He said he was told this by Byron, the store security guard. The Respondent said Byron appeared to be by himself but he did notice another worker close by. The Respondent said that he did attempt to take one of the yellow cans out of his bag. He still had one can under his arm and one in his hand at that time. As he pulled the can out of his bag he was tapped on the shoulder.

The Respondent said Byron tapped him on the shoulder, took the cans from him and told him he was under arrest and that he needed to go to the back. The Respondent denied that Byron told him to get out of the store. The Respondent said although he was

not intimidated by Byron, he was a police officer and knew that he could not be argumentative or combative so when he was directed to the back of the store he complied. He explained that when they got to the back of the store the security guards became aggressive with him, they pushed him and took his bag and opened it. They also took the can of formula that he had under his arm from him. The Respondent said they saw the formula in his bag and he explained to them that he came in the store with those. He said that he had gotten them from another store. They asked for the receipt and he informed them that either the receipt was in the bag or he did not get a receipt and they called him a liar. They began to search him, felt his firearm and backed away. He then informed them that he was a police officer and he pulled out his identification. The Respondent said he watched as they pulled out the cans and noticed that some of the cans were from another store. He said they became confused and did not know what to do. The Respondent said that the manager came in and that he tried to explain to him that he was not stealing. He said they began accusing him of stealing the three cans that he brought with him to exchange.

The Respondent testified that they had a series of discussions where he mentioned that his wife may have obtained the formula that he had from the WIC program. The Respondent said as he stood in the doorway in the back, McMillan walked in, made a derogatory statement toward him and took his firearm and ID card. He was directed to stand in the corner while McMillan spoke to the Rite Aid personnel. McMillan came back and informed him that things were not looking good for him. He explained to McMillan that he did not try to steal anything, that he was standing on line trying to do an exchange and that he never attempted to walk out of the store at any point. McMillan

walked back over to the Rite Aid personnel and conferred with them again at which point he then called the 73 Precinct Station House. McMillan was advised to bring all of the parties back to the station house. At the end of the evening, the Respondent stated that he was officially charged with attempted petit larceny, suspended from the Department and given a desk appearance ticket with a return date for criminal court. He stated that all of the cans of formula were vouchered. He said that his knapsack was also vouchered.

With respect to the desk appearance ticket, the Respondent testified that he believed that he appeared at court on March 6, 2006. He waited approximately two hours and was told that the case was not ready. He said he was told that he would be notified in 90 days if the case would be ready to proceed against him. He said that the case was never written up. The Respondent said his case was effectively dismissed but that there was never an official dismissal from the DA's office because the DA's office never drafted the paperwork on the case.

After being arrested for petit larceny, the Respondent said he knew he was being accused of stealing and he needed to know where the formula came from. He had a discussion with his wife who informed him that the WIC program was for any woman who had a child in New York City. She told him that her doctor signed her up for the program and she was not proud to be in it. She did not inform him that there was any financial or income requirements to be in the program. Malcolm showed him her identification card with her name and their son's name on the card. The Respondent said that during his Official Department Interview, he volunteered the information that he had obtained from his wife regarding the WIC program.

Sometime after his Official Department Interview, the Respondent stated that he was informed by the Department Advocate's office to come in for new charges. He stated that the petit larceny charges were dropped and that he was served with additional charges including administrative charges which he had previously had, which is the basis of the trial he is currently facing. The Respondent said he was now facing a grand jury charge, a new Rite Aid charge of violating their return policy and administrative charges and his offer was to vest. There was no other offer on the table. The Respondent felt that his career was not over and he opted to proceed to trial. The Respondent said he was given a trial date of April 24 and 25 in 2008 but when he came for trial, it was adjourned. He learned that a new investigation was being investigated prompted by the Assistant Department Advocate. He learned that the new investigation involved welfare fraud. The Respondent said he was notified of a new Official Department Interview involving welfare fraud and the WIC program and he was given approximately five days notice prior to the interview date.

The Respondent testified that his first Official Department Interview with O'Hare involved attempted petit larceny and the formula. The second interview involved welfare fraud which he had to do research to understand what that entailed. He stated that during the course of his investigation, he learned that the WIC program had income guidelines. He stated that he did not know about the income guidelines at the time of his first Official Department Interview. The Respondent said he learned subsequent to his second interview when he received the discovery in this matter that the information his wife told him was a lie. He learned that she filled out an application for WIC without his knowledge and that there were income guidelines that she made a written statement under

oath and that she had to pay back money. He also learned that she filled out an application and never mentioned him or involved him at all in the application process. He stated that he trusted her because she was his wife but as of this date they are officially divorced. He said the last time they spent time together as a family was in 2005. He acknowledged that that was approximately one month prior to his arrest.

The Respondent stated that he was never arrested for welfare fraud. He was never charged with possession of stolen property in criminal court nor any criminal liability for the conduct of anyone else. He was never charged with petit larceny for stealing from the WIC program either. He stated that he was never interviewed by anyone from the WIC program, nor was he contacted by the Department of Investigation or the DA's office and accused of welfare fraud.

With respect to the administrative charges, the Respondent stated that on January 30, 2006, while at the Rite Aid store he had his firearm but he did not have his shield with him as required by the Department. He stated that he was considering paternity leave and things were chaotic at home and he was in a rush and his shield had been attached to his uniform shirt in his locker. He explained that he changed without ever taking the shield off of his uniform shirt. The Respondent explained that it was his first day back after being off-duty for four weeks and he grabbed his Kahr K-9 firearm. The Respondent stated that he purchased the firearm on January 26, 2005 and upon purchasing it, he had to fill out an acquisition form which he did the same day even though he was entitled to ten days from the date of purchase to complete the form.

The Respondent explained that the procedure after purchasing the firearm from an authorized dealer was he brings the firearm to the station house and hands it to the desk

officer. He and the desk officer complete the acquisition form for the state police. He hands his gun to the desk officer who inspects it and makes sure the gun is the same one that is on the form. He explained that the desk officer is supposed to put the firearm on the force record card and that they schedule him for his next range date to fire his firearm. He also believed that the desk officer makes an entry in the command log regarding this information. The Respondent said that he did note that Rios did make an entry in the command log at that time. He thought that he made the entry onto the Force Record card as well. He explained that as a police officer he does not have access to his own Force Record card. The Respondent, upon questioning by the Court, stated that Rios kept his acquisition form at that time.

The Respondent stated that he was instructed to report to the range and he went in February of 2005 and qualified with his Kahr-K9 firearm. He was instructed to report to the range again in September of 2005 and he stated that he qualified with his Kahr-K9 on that date also. He explained that no one informed him that he did not qualify with his weapon. The Respondent stated that during his Official Department Interview he was advised that the range record was not concise with regard to his qualification using his Kahr-K9 firearm. The Respondent stated that when he took the Kahr-K9 to the Rite Aid store he thought it was fully loaded but he learned later on that it was missing one round of ammunition.

With respect to the charge that he did not have his telephone number properly updated, the Respondent testified that when he got to his new command he filled out a force record card. The Respondent explained that Taylor had his cell phone number as well as his home number and that he could be reached at any time by any one at his

station house. He further explained that based on his arrest, inspections was trying to get in touch with him and could not reach him so they preferred charges and specifications against him. The Respondent stated that the telephone number on his force record referred to a family member who [REDACTED] who has since passed away. [REDACTED]  
[REDACTED]

[REDACTED]. He acknowledged that he needed to give the Department a second phone number which he failed to do.

The Respondent acknowledged that he is being charged with giving conflicting information in his two Official Department Interviews regarding the Rite Aid incident. When asked about the conflicting information, the Respondent stated that at his Official Department Interview, he was specifically questioned about stealing, attempted larceny and the additional cans of formula. He answered the information based on what his wife had told him regarding the WIC program. He further explained that although he knew the formula came from the WIC program he did not know if WIC provided the actual formula itself or if the formula had come from a store. He further explained that by his second Official Department Interview, when asked specifically where the three cans had originally come from he stated that he did not know specifically where they came from. He did not know if the cans came from Rite Aid, from Waldbaums or from Pathmark. He stated as he sat in court that day, he did not know where the cans of formula came from.

In retrospect, the Respondent stated that when he went to the Rite Aid store he should have gone immediately to the cashier, mentioned that he wanted to make an exchange, left the three cans of formula there and then went down the aisle to pick up the

ones he wanted to exchange them for. He also stated that with regard to the grand jury case, he would not have taken on doing this type of undercover work without training. Secondly, he should have been upfront with the ADA regarding all of the material he had to make sure that it was reviewed.

The Respondent testified that he is suing Rite Aid for the embarrassment, humiliation, loss of sleep and the inability to eat based on the Rite Aid incident. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]. The whole event has ruined his name. With respect to the charges regarding welfare fraud, the Respondent stated that they are all criminal charges and that he has never been criminally charged with any misconduct.

During cross-examination, the Respondent stated that his [REDACTED] and that his wife did not start the WIC program until November. He said that for a two month period he did not know if the formula that was in the house was purchased at the store or whether it came through the WIC program. In January of 2006, the Respondent explained that he gave his son Gentlease when he was with him and that that formula was working. He explained that on that date, his wife was still purchasing the other formula. He explained that when his son was with him he did not throw up or have problems burping or sleeping. But when his son was with his wife he did know what formula she was using.

The Respondent acknowledged that when he first walked into the Rite Aid store he did not tell anyone that he was planning to exchange formula. The Respondent stated

that he was unaware whether the cans were labeled with a tag which would identify which store the formula was from. When asked whether he had a receipt for the three cans of formula he had at Rite Aid, the Respondent stated he thought he had an exchange receipt from the previous Rite Aid store. He stated that he believed that receipt was in his bag. The Respondent said he informed the security officers that the receipt was in the bag but no one would allow him to do anything. The Respondent acknowledged that he had seen the video at least a hundred times and at no point during review of the video could he see a can of formula under his arm. He explained that the formula came from under his arm when he walked to the back with the security guard and one of them took the can from him.

The Respondent stated that when he walked up to the cashier he did not give her a receipt for the two cans of formula. He believed he told the cashier that he forgot to bring the receipt. The Respondent stated that in January 2006 he did not make an independent inquiry into the WIC program. He explained that it was sometime after that that he did some on-line research and discovered that the program had income requirements. He stated that it took him approximately a half hour of extensive research to determine that information. He never had discussions with his wife about getting the proper formula for his baby through the WIC program. The Respondent denied knowing that his wife was getting other items through the WIC program such as bread and other groceries. The Respondent stated that he never thought it was odd that his wife was receiving assistance with formula while he was working. He explained that she was on disability and he thought she was able get the assistance from WIC. He acknowledged that he did have a job and they were married. The Respondent denied ever working on

any welfare fraud cases while a police officer. He also said he was unaware of any welfare fraud statutes. The Respondent stated that he did become aware of someone charged with welfare fraud. He said that a police officer he knew was charged with welfare fraud but that the officer had signed for the fraud.

The Respondent agreed with the definition that welfare fraud was obtaining government benefits to which one was not entitled to. He denied knowing that welfare fraud is where a mother/wife signed up for welfare and did not include the support she received from her husband. He explained that at the time this was transpiring he did not know that that was considered welfare fraud. The Respondent stated that he never thought to investigate the WIC program. He explained that he had a four month old son who was not sleeping through the night and his main concern was the welfare of his son, not whether his wife should be investigated. He stated that it never occurred to him that his wife was receiving benefits that she should not have been receiving.

The Respondent was asked whether during his Official Department Interview in October 2008, if he was aware in November 2005 that his wife was involved in the WIC program and he stated, "No." When read a portion of his Official Department Interview where he answered yes, the Respondent stated that he became aware in December or January that his wife was involved in the WIC program not in November of 2005. The Respondent also stated that in November of 2005 they were still experimenting with baby formulas and he did not know which was the correct one for his son to use. It was not until January of 2006 that they became aware of which formula worked for his son. The Respondent stated that it was not until after his arrest that he first saw his wife's WIC

enrollment card. He stated that on the night of his arrest he was not in possession of her WIC card.

With respect to the narcotics transactions, the Respondent acknowledged that he did not physically make the drug buys that occurred on July 22, 2004, August 5, 2004, and October 21, 2004. He admitted they were made by a confidential informant. He also acknowledged that he did not actually hand the money to the person who was making the sale nor did he personally receive the drugs from the person making the sale. He acknowledged that in his grand jury testimony he testified, in fact, that he personally made the buys. The Respondent acknowledged that prior to giving the testimony he was sworn in at the grand jury to tell the truth. He acknowledged that he never testified at the grand jury that it was, in fact, the confidential informant (CI) who made those purchases.

With respect to the second sale on August 5, 2002, the Respondent acknowledged that he stated to the grand jury that he went to the apartment, he knocked on the door, the subject came to door, she handed him a crack vial or zip lock and he handed her ten dollars US currency. He agreed that with respect to the third sale held on October 22, 2004 he in essence stated that the same thing transpired. The Respondent admitted that he indicated to the grand jury he had obtained a search warrant based on these sales and he also stated that he had to prove that he brought the drugs at that location. The Respondent denied that he was ever told by someone that he needed to lie to the grand jury. When asked whether someone told him that it was necessary to lie to the grand jury in order to protect the CI, the Respondent stated that he was only told to protect the CI. He was told to protect the CI by Taylor. He denied that Taylor told him that in order to protect the CI he needed to lie before the grand jury. The Respondent stated that he never

questioned Taylor regarding what he meant when he said to protect the CI. The Respondent denied that the ADA assigned to his case ever told him to leave out testimony regarding the CI. The Respondent explained that the ADA never told him to leave out the testimony, but he also never corrected him when he did leave out the testimony while testifying.

The Respondent testified that he was not next to the CI during all three buys. However, he did observe all three buys being made. The Respondent stated that he never asked the ADA or a supervisor how he was supposed to testify without bringing in the information regarding the CI. The Respondent stated that at one point he did express concern to his supervisors about handling the CI issue and he was given a manual. The Respondent denied that the manual told him to give incorrect information when testifying before the grand jury. He stated that the manual simply showed him how to fill out a DD5.

The Respondent explained his decision to attempt to protect the CI. He stated that since the CI was a principal agent he thought that the CI was an agent of the Department and he did not have to name him in order to protect his identity. The Respondent acknowledged that in his report he indicated that the CI made the drug buys. The Respondent acknowledged that in his Official Department Interview when questioned by Anderson as to why he left out the information about the CI, he stated that he made an honest mistake. He admitted that he did not say at that time that he was protecting the CI.

The Respondent acknowledged that the application for a search warrant in this matter was his first instance of requesting one from a judge. The Respondent admitted that when he applied for the search warrant, he was sworn in by the judge and that he

signed the search warrant application. The Respondent admitted that the first paragraph of the search warrant states that he participated in the execution of two search warrants.

During redirect examination, the Respondent stated that he had participated in previous activities regarding search warrants. He explained that on previous occasions, he was in the ride along car and before the search warrant was executed he was part of the team that was debriefed at the station house. He further explained that whether the execution of the warrant is by Emergency Services or narcotics, there are still precinct personnel who are at the scene of the execution of the warrant. He stated that personnel will be in an ambulance car, one car would be the chase car in case things get out of hand, and another car is just for police officers themselves. He said this is how he previously participated in search warrant cases. He stated that this case was the first time he had ever gone before a judge to get a search warrant on his own. He testified that on either two or three previous occasions, he either was involved in the actual execution by breaking down the door or securing the premise with respect to the execution of the search warrant. The Respondent said that the ADA asked for that information. The ADA was trying to determine that he was not a lay person and that he did have experience knowing how drugs could be identified and what drugs look like.

During questioning by the Court, the Respondent stated that on January 30, 2006, his son was approximately three months old and he was only consuming formula at that time. He stated that on January 30, 2006 he worked approximately two days into the new year but had been off from patrol for approximately four and half weeks. During that time his wife had returned to work and he was home with his son. He further stated that he did not carry his firearm at home and they were all left in his locker at work. The

Respondent stated that at no time did he ever use a WIC voucher to obtain formula for his son. The Respondent stated that on January 30, 2006 he was still purchasing formula for his son and he believed his wife was purchasing formula as well. His wife was also receiving formula through the WIC program. Between November 2005 and March 19, 2006 the Respondent testified that he did not know how his wife went about getting formula through the WIC program. He stated that after his arrest and his first court date on March 6, 2006, it became pertinent for him to find out information about the WIC program. He informed his wife that there was a question raised about him stealing formula and he inquired of her how she obtained the formula. She informed him of the three formulas he possessed, two she purchased at Rite Aid and one she got from Pathmark. The Respondent stated that at no point did she explain to him how she used the WIC vouchers and he knew nothing about the WIC voucher program. The Respondent explained that he finally learned about the WIC vouchers shortly before his Official Department Interview with O'Hare.

#### FINDINGS AND ANALYSIS

##### Disciplinary Case No. 81306/05 Specification No. 1

The Respondent stands charged herein with engaging in conduct prejudicial to the good order efficiency or discipline of the Department in that he gave incorrect testimony to a Kings County Grand Jury regarding a narcotics operation held on July 22, 2004, August 5, 2004 and October 22, 2004. He is charged with testifying that he purchased cocaine from a person known to the Department when in fact, he did not make the cocaine purchases personally on those dates. The Respondent is found Guilty.

Evidence adduced at trial established that the Respondent was involved in a narcotics operation with a confidential informant (CI) who offered his assistance in buying narcotics from locations he knew to be drug locations. The Respondent acted as a ghost to the CI who made the purchases on three dates. The Respondent testified before this tribunal that although he was in close proximity to the CI when the CI made the cocaine buys, he [the Respondent] was not the buyer. The Respondent testified, however, that when he testified before the grand jury regarding these three buys, he stated that he made the cocaine buys. The Respondent stated in his Official Department Interview that he made an "honest mistake." He testified before this tribunal that he thought his job was to protect the confidentiality of the CI at all times as he was instructed by his supervisor. He also thought that the CI was an agent of the Department and that a buy by the CI could be construed as a buy by the Department and that he could state that he [the Respondent] made the buys.

The Respondent acknowledged during cross-examination that he was never instructed by anyone to leave out the participation of the CI in his grand jury testimony. He was never instructed by the ADA assigned to the case to leave out the CI. The Respondent acknowledged that all of his paperwork including DD5s referred to the role the CI played in making the cocaine buys. In addition, the Respondent testified that he sought a search warrant from a judge in connection with these three buys and mentioned the CI in the affidavit for the search warrant as well as took the CI to court as he sought to obtain the search warrant.

Based on the above, I find the Respondent Guilty of Specification No. 1.

Disciplinary Case No. 81660/06Specification No. 1

The Respondent stands charged herein with attempting to return baby formula to a Rite Aid where it was not purchased without presenting a receipt. The Respondent is found Not Guilty. It was established at trial that the baby formula products presented by the Respondent at the Rite Aid counter were Rite Aid products. Although some in his possession were from other Rite Aid stores, all the items were Rite Aid products. Byron testified that Rite Aid has an open return policy allowing a customer to return one product for a similar product by way of an "even exchange." Thus, the Respondent could return one brand of baby formula for another brand. This exchange can occur even if the products were purchased from different Rite Aid stores. The witness further testified that this exchange can occur with or without a Rite Aid receipt.

It must be noted that the Respondent was not charged with *petit larceny*, i.e. stealing the Rite Aid merchandise. It was also established at trial that the Respondent never attempted to leave the Rite Aid store with any merchandise not purchased in his possession.

Accordingly, The Respondent is found Not Guilty of Specification No. 1.

Specification No. 2

The Respondent stands charged herein with failing to carry his shield at all times when off duty and not in uniform on January 30, 2006. The Respondent is found Guilty as charged. The Respondent testified in mitigation of this charge that he had been off-duty for approximately four weeks prior to January 30, 2006. He was contemplating taking a family leave to care for his newborn son. He further testified that he

inadvertently left his shield affixed to his uniform in his locker during the time he was off from work and it remained there on January 30, 2006 when the incident transpired at the Rite Aid store.

Because the Respondent in essence, pleaded Guilty he is found Guilty as charged in Specification No. 2.

Specification Nos. 4 and 3

The Respondent stands charged herein with failing to record his Kahr K-9, 9mm semi-automatic firearm on his Force Record Card, as required. He is also charged with wrongfully carrying an unauthorized firearm, to wit, Kahr K-9, 9 mm semi-automatic without permission or authority to do so. The Respondent is found Guilty as charged. Evidence adduced at trial established through the testimony of O'Hare was that the Kahr K-9 was not listed on the Respondent's Force Record Card, as required by the Department. In addition, although the Respondent had completed the paperwork after obtaining the firearm, an error had occurred and the information was never entered into the Department database. O'Hare stated that the onus to insure that one's Force Record Card is updated rests with the member of the service.

Patrol Guide 204-08 which governs the general regulations for firearms states in pertinent part in section 3:

*Record all revolvers and pistols on FORCE RECORD (PD 406-143)* (Emphasis Added).

The Respondent had a duty to ensure that his Force Record Card was updated at all times and reflected the firearms that he had in his possession.

O'Hare opined that when the Respondent reported to the range in September 2005, he did not qualify to carry the weapon making it unauthorized for him to carry it. He could not ascertain if the Respondent did not qualify because he reported to the range without the Kahr K-9; or if he fired the weapon and simply did not qualify. He could only conclude that the Respondent failed to qualify to carry the firearm at that range date.

O'Hare testified that although the Kahr K-9 is an authorized off-duty weapon, a member must qualify at the range to carry it. He also testified that the Department mandates that members must qualify with their firearms two times a year. Because the Respondent was unqualified, he was unauthorized to carry the Kahr K-9 firearm on January 30, 2006.

Accordingly, I find the Respondent Guilty of Specification Nos. 4 and 3.

#### Specification No. 5

The Respondent stands charged herein with failing to fully load his Kahr K-9, 9 mm semi-automatic firearm in compliance with the Department's Firearms and Tactics Section. The Respondent is found Guilty as charged. O'Hare testified that when the Respondent's Kahr K-9 firearm was secured by the Department on January 30, 2006, he had six cartridges in the magazine and one in the chamber but it was short one round. O'Hare explained that the Department mandates that officers keep their guns fully loaded at all times so that their weapons are ready to fire even with one hand.

Accordingly, the Respondent is found Guilty of Specification No. 5.

Specification Nos. 6 and 7

The Respondent stands charged with having changed his telephone number and failing to submit the Change of Name, Residence or Social Condition form (PD 451-021) as required. He is also charged with failing to inform his commanding officer in the event of emergency notifications of his changed telephone number. The Respondent is found Guilty as charged. O'Hare testified that upon his review of the Respondent's personnel profile, the Respondent had old telephone numbers listed and failed to inform his commanding officer of his new telephone number for emergency purposes.

Accordingly, the Respondent is found Guilty of Specification Nos. 6 and 7.

Specification No. 8

The Respondent stands charged with making false statements on or about November 30, 2006 and/or October 28, 2008 in that when questioned by O'Hare during an official investigation as to how formula found on his person was obtained, he stated on November 30, 2006 that it was obtained through the WIC program, but that on October 28, 2008 he had no knowledge of where the formula had been obtained. The Respondent is found Not Guilty. Evidence adduced at trial established that the Respondent was questioned about the formula. O'Hare testified that he thought his questions were clear during the interviews when he asked the Respondent where the formula came from. He thought the Respondent knew he was referring to the WIC program. He did acknowledge, however, that it was possible that the Respondent thought he was referring to the actual store that the formula was purchased from. The Respondent testified that he

knew his wife obtained formula from WIC in November 2005, but the exact store that the formula was purchased from by his wife he had no knowledge.

This Court reviewed both Official Department Interviews of the Respondent held on November 30, 2006 (DX 11 A) and October 28, 2008 (DX 12 A). With respect to the first interview, the Respondent was never specifically asked if the formula he had on his person came through the WIC program. The Respondent voluntarily revealed that his wife gets WIC and there was a discussion that followed. The Respondent discussed the WIC program and how formula is obtained through vouchers. The Respondent ended the discussion by stating that only his wife is allowed to pick up the formula, he cannot do it and she would bring the formula home. The exchange was as follows (Official Department Interview November 30, 2006 p. 9 lines 19-23; p. 10 lines 1-23; and p. 11 lines 1-12):

**P.O. Malcolm:**      **What happens is my wife gets WIC**

**Sgt. O'Hare:**      **Your wife being whom?**

**Malcolm:**      [REDACTED] **Malcolm.**

**O'Hare:**      **Okay.**

**Malcolm:**      **My wife gets WIC. WIC doesn't have the new formula in their system. They have the old one so it goes by specific, you have to pick up what the receipt tells you to pick up. She picks up this one, doesn't serve us any purpose...**

**O'Hare:**      **Now where do you pick these up?**

**Malcolm:**      **Um any store, an retailer that will give it to you, be it Rite Aide, Pathmark...**

**O'Hare:**      **[Y]ou would get some sort of voucher for the one that WIC has on their list...**

**Malcolm:** Right...

**O'Hare:** ...in exchange for giving the merchant a copy of the coupon or authorization...

**Malcolm:** Correct.

**O'Hare:** Subsequent you would return that one with the WIC for the one you wanted.

**Malcolm:** There was no money exchanged...

**O'Hare:** ...would you subsequently then return to that same store or a different store?

**Malcolm:** Well, she's only been allowed to pick it up, I can't do it. We don't have the same numbers. Um so she'll bring it home...

There was no discussion of how the replacement formula was obtained, by whom and from what location. It was only established that the Respondent's wife obtained formula from WIC. There was no discussion as to whether the Respondent purchases formula on his own, whether his wife also purchased formula or whether the formula obtained from WIC was the only source of formula that the Respondent's baby uses.

With respect to the second interview, the Respondent was asked not by O'Hare, but by the Assistant Department Advocate whether he was aware that his wife was receiving WIC benefits. He initially stated, "No," but then stated that he became aware in November 2005. The exchange was as follows (Official Department Interview October 28, 2008 P. 7 lines 11-21):

**L. McFadden:** Now were you aware that your wife was receiving benefits through the WIC program?

**P.O. Malcolm:** No.

**Attorney:** Ah, well what time period are you asking?

**L. McFadden:** After their child was born.

**P.O. Malcolm:** No, she didn't receive WIC until November.

**L. McFadden:** November of what year?

**P.O. Malcolm:** of '05.

**L. McFadden:** November of '05, okay. So you became aware of it at that time?

**P.O. Malcolm:** Yes I did.

The discussion continued as to how much the Respondent knew about the WIC program in 2005 and whether he questioned his wife about it. The Respondent stated that he did not question his wife about the program and he did not learn until he did research that the program was a federally funded program to supplement nutrition for children. The discussion continued as follows (p. 12 lines 14-23):

**L. McFadden:** So you didn't need to be in WIC to get the formula you needed in order to help your baby as far as you know?

**P.O. Malcolm:** As far as I know, no.

**L. McFadden** Okay. You could have just gone out and purchased the formula through a store the regular way, as opposed to WIC.

**P.O. Malcolm:** I did purchase the formula. I did purchase the formula

**L. McFadden:** But you also used WIC coupons to get formula.

**P.O. Malcolm:** I did not use, I did not use WIC coupons.

**L. McFadden:** You never used WIC coupons?

**P.O. Malcolm:** No I did not, my names not on it. You can't if you have ever seen a WIC coupon it has to have your name on it, stipulated who to use it...

**L. /McFadden:** Did you know that she had to obtain a coupon that had to be in her name in order to obtain the formula?

**P.O. Malcolm:** No.

The Respondent denied knowing that his wife had a WIC identification card at that time. He stated that he learned about it after his arrest and gave it to O'Hare not on the night of his arrest, but at his Official Department Interview. Inquiries were made as to where the formula came from on the night of the Respondent's arrest. The inquiry went as follows (p. 18 lines 17-19; p. 19 lines 7-9, 14-21):

**L. McFadden:** **Okay. Now the night you were arrested, January 30<sup>th</sup> of '06, you went into a Rite Aid, is that correct?**

**P.O. Malcolm:** **Yes I did.**

**L. McFadden:** **Okay. When [Where] did it come from before you exchanged it at Rite Aid?**

**P.O. Malcolm:** **I said she left it on the table...**

**L. McFadden:** **...Okay. And what was your understanding of where she had obtained the formula?**

**P.O. Malcolm:** **I never questioned it.**

**L. McFadden:** **You didn't question it? And what was your intent with the formula that she had left on the table?**

**P.O. Malcolm:** **My intent was to exchange it.**

**L. McFadden:** **And why were you going to do that?**

**P.O. Malcolm:** **Because we needed the right formula for Joshua.**

It is unclear from this line of questioning whether the Assistant Department Advocate is asking whether the cans were WIC cans or what store his wife purchased the formula from. At a later point the discussion continued (p. 22 lines 14-16, p. 23 lines 10-12, p. 26 lines 15-17, p. 29-18-20):

**L. McFadden:** **And when you went to the second Rite Aid were you aware that the cans that you had in your bag were WIC cans?**

- P.O. Malcolm:**      **No. It wasn't an issue for me to be aware of...**
- L. McFadden:**      **...Okay. So the last, the last original can you bought to the second Rite Aid, you were not aware at that time that that was obtained from WIC?**
- P.O. Malcolm:**      **No.**
- L. McFadden:**      **...The formula that you had exchanged in the past, do you know if that was obtained from the WIC program?**
- P.O. Malcolm:**      **No...**
- L. McFadden:**      **Anytime that you made an exchange, were you aware that the product that you were using was a WIC product?**
- P.O. Malcolm:**      **No.**

The series of questions posed to the Respondent repeatedly includes the phrase, "Were you aware," which assumes that he was focused on the fact that he was exchanging a WIC product for the proper formula and the Respondent repeatedly testified that he was not focused on the fact that the product was a WIC product. The Respondent was never asked the seminal question of whether his wife received formula from any other source, i.e., did she purchase formula also. The Respondent had already stated that he purchased formula. Without asking that key question, there was too much room for misinterpretation of what answer the question was trying to elicit. In addition, there were very few unambiguous questions posed to the Respondent by either O'Hare or the Assistant Department Advocate that could be construed to ask the question where the formula came from that was on his person on the date of the incident in the Rite Aid store. Thus, without specifically posed questions to the Respondent, there is too much room for ambiguity and a false statement charge could not be sustained.

Accordingly, the Respondent is found Not Guilty of Specification No. 8.

Specification No. 9

The Respondent stands charged with interfering with an official Department investigation in that when questioned by O'Hare, he stated that he had been using and exchanging formula obtained through the WIC program, but on October 28, 2008 provided conflicting information when he stated that he had no knowledge of where said formula had been obtained. The Respondent is found Not Guilty for the reasons outlined in Specification No. 8. O'Hare acknowledged that when he questioned the Respondent, the Respondent could have thought that his questions were referring to the specific store that the formula was purchased in, as opposed to what program, i.e., the WIC program, the original formula came from. In addition, there were no specifically posed questions to the Respondent to differentiate when the discussion was on the original formula versus obtaining the replacement formula. Without specific questions, an ambiguous response could be elicited which would not support a charge of interfering with an official Department investigation.

Accordingly, I find the Respondent Not Guilty of Specification No. 9.

Specification No. 10

The Respondent stands charged herein with acting in concert with another to knowingly and with the intent to defraud, make a false statement or provide false information for the purpose of establishing or maintaining eligibility for public assistance benefits, and did thereby take or obtain public assistance benefits from the WIC program.

The Respondent is found Not Guilty. Evidence adduced at trial established that the Respondent's wife, on her own volition, applied for benefits through the WIC program. She submitted an application, failing to mention that she was married and had a spouse who provided support for her family. WIC vouchers were issued in Carline Malcolm's name alone. She was the only one who could submit the vouchers to obtain baby formula through the WIC program. An investigation was conducted by the New York State Department of Health Bureau of Special Investigations. It was determined that the Respondent's name did not appear on any of the WIC application paperwork. Nor did the Respondent submit any vouchers to obtain WIC formula. The Respondent stated that he did not know when his wife submitted the application for WIC and she told him that her doctor signed her up for it and that all women with children are entitled to WIC. The Respondent testified in court that he later learned this information, from his former wife (they have since divorced), was a lie.

The Respondent could not be acting in concert with his wife if there is not a scintilla of evidence that he was a participant in her application for WIC and use of the WIC vouchers. The Respondent did not make a false statement or provide false information because he did not submit the WIC application. The investigation determined that his wife falsely represented income eligibility to WIC and she alone was required to repay the benefits she received back to WIC. The Respondent stated in his Official Department Interviews that when his wife was receiving WIC, he was not fully aware that it was considered a federally funded public assistance program. The Respondent lacked the requisite knowledge to be considered a participant in the fraud. Moreover, the Respondent was never criminally charged in this matter, nor did the

Brooklyn North Investigations Unit, who also conducted an investigation into this matter for welfare fraud, ever sustain such an allegation against the Respondent.

Accordingly, for all the reasons stated above, I find the Respondent Not Guilty of Specification No. 10.

Specification No. 11

The Respondent is charged with petit larceny in that he acted in concert with another to steal property from the WIC program. The Respondent is found Not Guilty. As outlined in Specification No. 10, the Respondent did not participate in the application for WIC or in obtaining formula through the WIC program. The Department of Health Special Investigations Unit conducted an investigation and found that the Respondent's wife had to repay the benefits she received through the WIC program by filing an application and failing to mention that she was married and received financial support from the Respondent. The Respondent stated in both his Official Department Interviews that he did not make in depth inquiries of his wife about the WIC program; that he never submitted WIC vouchers for formula and he did not apply for WIC. Given the fact that the Respondent's wife acted alone, the Respondent should not be held criminally liable for her misdeeds. There was no evidence presented at this trial that the Respondent had the mental culpability required to engage in theft from the WIC program. Nor was there evidence presented to establish that the Respondent solicited, requested, commanded or aided his wife in the submission of a WIC application to obtain WIC benefits.

Accordingly, for all the reasons stated above, I find the Respondent Not Guilty of Specification No. 11.

Specification Nos. 12 and 13

The Respondent stands charged with engaging in criminal possession of stolen property in the fourth degree in that he knowingly possessed stolen property with the intent to benefit himself or a person other than the owner, to wit: formula from the WIC program. The Respondent is also charged with violating the WIC program by acting in concert with another and knowingly misrepresenting circumstances in order to obtain WIC benefits. The Respondent is found Not Guilty.

In order to sustain a charge of criminal possession of stolen property in the fourth degree, certain threshold requirements must be met in the penal law:

1. The person must knowingly possess stolen property with the intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner and
2. the value of the property must exceed one thousand dollars; or
3. the property consists of a credit card, debit card or public benefit card; or
4. the property consists of one or more firearms; or
5. the value of the property is in excess of one hundred dollars and is a motor vehicle; or
6. the property consists of a scroll or religious vestment or used for religious worship.

Formula from the WIC program does not fall into any of the above-mentioned categories. In addition, the Respondent's wife had to repay the benefit she received from the WIC program which totaled \$343.31 which does not meet the

threshold dollar amount of \$1,000.00 governed by the penal law statute.

Furthermore, as was previously stated in Specification Nos. 10 and 11, the Respondent's wife, on her own accord, applied for and obtained the WIC formula telling her husband that her doctor signed her up for the program which was a fallacy. It has never been established that the Respondent possessed the WIC formula for the benefit of his son knowing that it was stolen property or that he participated in the misrepresentations made in the WIC application in order to obtain WIC benefits.

Accordingly, I find the Respondent Not Guilty of Specification Nos. 12 and 13.

#### PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974). The Respondent was appointed to the Police Department on July 18, 1996. Information from his personnel record that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

The Respondent has been found Guilty of giving incorrect testimony to a Kings County Grand Jury regarding the circumstances of a narcotics operation on three dates. The Respondent gave credible explanations which included the fact that he did not want to reveal the name of the CI. While it is true that he named the CI in his DD5s and affidavit for a search warrant, that is different from testifying to a room full of grand jurors. The Respondent also testified in his own defense that this was his first narcotics

case and he had received no training, and that he received only perfunctory trial preparation prior to testifying before the grand jury. Further, there was no personal gain to the Respondent based on his testimony. However, the Respondent still took an oath prior to testifying and had an obligation to testify correctly. In trying to formulate a penalty for this misconduct, this matter is analogous to a number of DCT cases involving incorrect complaints submitted to district attorney's offices in prostitution/ drug cases where the penalty has been 30 vacation days.

The Respondent asked this Court to consider Disciplinary Case No. 79397/03 on the issue of this Respondent's grand jury testimony. In that matter, the Respondent was found Not Guilty of conduct prejudicial in that he wrongfully entered a premise without possessing a lawful search warrant authorizing the search of the premises. The Court found that the Respondent was part of a back up team and did not question the validity of the search warrant as he rendered assistance. The Court also found that the Respondent acted in good faith within the scope of his lawful authority. Cited was the premise that, "we do not require police officers to possess the expertise of a constitutional law professor when they take action." (See Disciplinary Case Nos. 75890/00 and 75891/00). I did not find that case to be on point particularly since this case did not involve police action on the street, but rather testifying under oath about police action taken. Also, the Respondent in this matter was not acting as back up or being led or directed by a seasoned police officer as he testified.

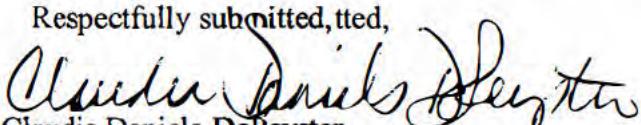
The Respondent has also been found Guilty of seven administrative violations which include: failing to carry his shield, carrying an unauthorized firearm, failing to record a firearm on his Force Record card, failing to fully load his Kahr- K-9 firearm,

failing to submit a Change of Name, Residence and Social Condition form when his telephone number changed, and failing to notify his commanding officer of the changed telephone number. O'Hare of the Brooklyn North Investigations Unit testified that the onus is on the Respondent to insure that his Force Record and other personnel records maintained by the Department are updated. With respect to the administrative violations, this Court recommends that the Respondent forfeit an additional 30 vacation days.

Given the number of administrative violations that the Respondent has been found Guilty of, coupled with his performance record with the Department, a period of monitoring is warranted to ensure that this type of conduct will not be repeated. This tribunal has held that a period of dismissal probation "gives the Respondent the benefit of another chance to show that he can be an asset to this Department while affording the agency the prerogative of ending his employment if he does not." (See Disciplinary Case No. 75596/00 and 75441/00).

Accordingly, this Court recommends that the Respondent be DISMISSED from the New York City Police Department, but that the penalty of dismissal be held in abeyance for a period of one year pursuant to section 14-115 (d) of the Administrative Code, during which time he remains on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings. I further recommend that the Respondent forfeit 60 vacation days.



Respectfully submitted,  
  
Claudia Daniels-DePeyster  
Assistant Deputy Commissioner-Trials

POLICE DEPARTMENT  
CITY OF NEW YORK

From: Assistant Deputy Commissioner - Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM  
POLICE OFFICER ALVIN MALCOLM  
TAX REGISTRY NO. 917117  
DISCIPLINARY CASE NOS. 81306/05 & 81660/06

The Respondent was rated 4.0 "Highly Competent" in his last three annual performance evaluations for 2006, 2007 and 2008, respectively. The Respondent has received eight Excellent Police Duty medals in his career.

[REDACTED] On February 14, 2001, the Respondent received Charges and Specifications for purchasing a raid jacket and bicycle shirt for a person not in law enforcement, failing to comply with an order, criminal association, failing to submit the Acquisition or Disposition of Firearms form after purchasing a Glock, requesting a post change when he had no scheduled court appearance, misleading supervisors regarding a court appearance when he had no court appearance, leaving his assigned post to conduct personal business, falsely identified himself as a police officer investigating a homicide to gain access to telephone records for use at his Department trial. The Respondent had a Department trial on February 10, 2003. The charges for failing to comply with an order, criminal association and misleading supervisors were dismissed. The Respondent pleaded Guilty to the remaining charges. Based on his mitigation, plea of guilt and overall performance record he received a penalty of 60 suspension days and one-year dismissal probation.

On February 8, 2007, the Respondent was placed in Level II Discipline Monitoring based on his overall record.

For your consideration.

  
Claudia Daniels-DePeyster  
Assistant Deputy Commissioner - Trials